BOOK REVIEWS


The Model Penal Code of the American Law Institute is one of the major works in criminal law. It has had a remarkable impact since its completion in 1962. More than half of the states have expressly relied on the Code, numerous other states have been influenced by it in their recent codifications, and innumerable court decisions have discussed the provisions of the Code. One of the difficulties with the Code stemmed from the fact that the original Commentaries to it were completed in 1962. In the two decades since the Code came out there have been tremendous changes in the substantive criminal law which were not reflected in the earlier commentaries to the Code. Many states have substantially limited the application of the felony-murder rule. With respect to the death penalty, the United States Supreme Court has been extremely active, holding that the "sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment," and further holding that death penalty statutes are only constitutional if they "guide, regularize, and make rationally reviewable the process for imposing a sentence of death." In other areas as well, the changes have been dramatic. Some states have begun to consider the possibility, at least, of convicting a husband for the rape of his wife.

* © 1982 by Paul Marcus. The excellent research assistance of Helen Gunn, University of Illinois College of Law, Class of 1983 is gratefully acknowledged.

1 According to the revised commentaries, 34 "state codifications or revisions have now drawn upon the Model." MODEL PENAL CODE AND COMMENTARIES XI (Official Draft and Revised Comments 1980) [hereinafter cited as COMMENTARIES].

2 The Code was also quite influential in the drafting of the proposed revised Federal Criminal Code, currently pending in Congress as H.R. 4711 97th Cong., 1st Sess. (1981).

3 Thirteen tentative drafts with accompanying comments were considered between 1953 and 1962.

4 See infra text accompanying notes 73-97.


7 See, e.g., OR. REV. STAT. § 163.375 (1979) which provides: "(1) A person who has sex-
and in most jurisdictions the problem of criminal actions revolving around child custody disputes has intensified.8

Professor Peter Low as Reporter and Professor John Jeffries as Associate Reporter, both from the University of Virginia School of Law, have provided a great service by revising and updating these commentaries. Their work began in 1976 and took almost five years; this tremendous effort is reflected in a fine product spanning three volumes.

In this article I will analyze the Code, along with the Commentaries, as found in the first of these volumes, "Offenses Involving Danger to the Person."9 Four separate topics are dealt with in this volume: Criminal Homicide (Article 210); Assault, Reckless Endangering, Threats (Article 211); Kidnapping and Related Offenses, Coercion (Article 212); and Sexual Offenses (Article 213). I will focus attention on the first of these topics.

This review is restricted to an evaluation of the homicide materials solely because of time and space constraints. Such a restriction is unfortunate, as important issues continue to arise in the other three areas and are well analyzed by the commentators. In the death penalty area much discussion is given to the questions of the role of the jury in imposing the penalty, the type of homicide which should be the subject of the penalty, and the decisions of the United States Supreme Court.10 The materials dealing with rape focus attention on the proof problems, the question of the desirability of gender neutral language in a rape statute,11 and grading of statutes which impose certain age limitations for

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8 Section 212.4 of the Code provides, in part, that an offense is committed if the defendant "knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian when he has no privilege to do so." See discussion in Commentaries, supra note 1, at 249-52, 257-61.

9 The other two volumes deal with offenses against property (arson, burglary, robbery, theft, forgery), offenses against the family (bigamy, incest) and offenses against public administration (bribery, perjury, obstructing governmental operations, abuse of office) or against public order and decency (riot, disorderly conduct, obscenity).

10 See discussion in Commentaries, supra note 1, at 110-71.

11 The commentators discuss this point:

There are a number of features of the Michigan statute that should be noted in contrast to the Model Code. Perhaps the most striking is the avoidance of gender specificity in the Michigan statute and the grading consequences of such an approach. Rape by a female upon a male or another female and rape by a male upon another male are treated in Michigan at the same level of seriousness as rape by a male upon a female. There is symbolic importance in the introduction of such an equivalence into the law. There are also cases where the trauma of rape may be just as great as in the male imposition upon a female to which the most serious form of the offense has been traditionally confined. But the fact remains, as reflected in the Model Penal Code, that rape is perceived as such a serious crime because of the frequency of attacks by males upon females and because of the peculiar harms generally associated with that form of the offense. Undoubtedly the serious sanctions of the Michigan statute are designed with that case in
sexual relations with an underage victim. Finally, in the assault area the Code “undertakes a substantial restructuring of prior law. It eliminates the common law categories and many of the antecedent statutory variations in favor of a single integrated provision.”

It is in the homicide area, however, that the Model Penal Code has had perhaps the greatest impact. In bringing uniformity to an inconsistent body of law, in taking positions on controversial substantive areas, and in developing a grading system which brings important policy considerations into the forefront of the punishment decisions, the Code’s contribution is significant. It is to this contribution that we now turn.

CRIMINAL HOMICIDE

The draftsmen of the Code chose to deal with a host of subjects under the rubric of “criminal homicide.” Analysis of responsibility for aiding the suicide attempts of another, a view of the capital punishment quandary, and a discussion of negligent homicide are but a few of the areas discussed. In this portion of the article, I will explore in some detail three subjects of particular importance: the definitions of criminal homicide, murder, and manslaughter.

The Model Penal Code, section 210.1, provides that:

“(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.”

There are three striking features of the homicide definition. The first is not apparent from a reading of § 210.1, but rather is one emphasized by the commentators. The Code simply requires that the actor cause the death of the victim. It thus “renders unnecessary the ancient requirement that death of another take place within a year and a day of mind and will in fact be imposed in such cases in all but a very few instances. Nevertheless, as an abstract proposition, the question of whether a rape statute should be drafted in sex neutral terms seems a close one. . . . [I]t may well be that the Michigan approach is the more desirable.

Id. at 294.

12 The rape materials are discussed id. at 274-356.
13 Id. at 183.
14 Controversial substantive areas of the law which the Model Penal Code has taken a position on are the grading of murder into degrees and the felony murder rule.
15 As might be expected, however, there are other features that are important as well, such as the limitation of homicide to actions which the defendant causes purposely, knowingly, recklessly, or negligently; and the division of criminal homicide into but three categories of murder, manslaughter, and negligent homicide.
16 COMMENTARIES, supra note 1, at 9.
the actor’s conduct,”17 the so-called year-and-a-day rule.

By the Eighteenth Century, and indeed much earlier, we find a general assumption that a homicide could be prosecuted as such only if the death occurred within a year and a day of the act; this was distinct from any question of the period of limitations for commencing a prosecution. . . . The standard, if perhaps unhistorical, explanation of the rule, often repeated in the books, is that in the condition of medical science until recent times, it would have been hard to establish convincingly a line of causation between an act and a relatively distant death, and it was thus plausible to make the presumption (‘conclusive’ as well as arbitrary) that a death more than a year removed from the assault or similar antecedent arose from a natural rather than the criminal cause. . . . Occasionally it has been surmised that the rule was linked in some way to the early function of the jury as reporters of the happenings of the vicinage who required no aid from witnesses—but the jury would not have had knowledge sufficient to trace cause to effect over a sizeable interval of time. . . . Again we find a suggestion that the rule was intended simply to soften the old brutal law regarding homicides.18

The rule has been subject to considerable criticism and has been rejected by many legislators and courts.19 As one New Jersey court put it:

The court recognize[s] advances in medical technology to which the law must respond.

The acceptance or rejection of available medical technology and machines which can postpone the actual time of death, due whenever it occurs, as a result of wounds inflicted upon a victim, should not insulate the assailant from trial and punishment for the crime.

The common law “year and a day rule” does not conform to present-day medical realities, principles of equity or public policy. We reject it as an anachronism and declare that it is no longer part of the common law of this State.20

The second striking feature of the homicide definition is that the Code does not define the crucial term “death.” This omission is, in a sense, justifiable because most states do not define the term in their penal codes and “because this delicate interplay between the criminal law and the advances of medial science is yet too uncertain to reduce to statutory formulation.”21 Such an approach by the draftsmen is too facile. In many states today efforts are being made to codify the definition of the term; in still others, judges have had to wrestle with different and conflicting definitions.

The commentators correctly note that in the vast majority of homi-

17 Id.
21 COMMENTARIES, supra note 1, at 11.
cide cases the meaning of death is not at issue. In these cases, no matter what the definition, the victim is clearly dead. In other cases, where the victim's condition is maintained through sophisticated medical technology, the question is a troublesome one. The issue was well stated by an English law professor, Ian Kennedy:

What is this discussion of death all about? Until comparatively recently, there was no argument about when someone was dead. Death was defined as "the absence of vital functions", breathing and heart beat. Then along came machines which could maintain a patient's breathing. Polio victims were among the beneficiaries of this development, since the so-called iron lung could now breathe for them. Then there appeared machines which could take over the functions of the heart and lungs for a while. Open heart surgery, in which the heart may be stopped for a period of time, became possible.

But inevitably a problem arose. If we regard someone as dead when his vital functions are absent, what do we do with someone whose vital functions are maintained by a machine and accompanying technology? The polio victim isn't dead, nor is the patient undergoing heart surgery. But the victim of a car accident whose head has been crushed is breathing by means of a respirator though the respirator may be ventilating a corpse. Clearly the machinery may mimic life when the patient is dead.

In this country the issue has begun to surface with some regularity, as in the case of State v. Fierro. The defendant there purposefully shot Victor Corella in the head. Corella was taken to the hospital where emergency surgery was performed. He was maintained on support systems for three days; at that point the systems were terminated and he was pronounced dead. The court conceded that under the common law test (which had been used up to that point in Arizona) he would not have been legally dead, for "the body of the victim was breathing, though not spontaneously, and blood was pulsating through his body before the life support mechanisms were withdrawn." Under the more modern view of death, Corella had died three days before the systems were withdrawn, because at that time his brain was no longer able to function. The Uniform Brain Death Act stated that "for legal and medical purposes an individual who has sustained irreversible cessation

Id. at 10.

The best known case raising the problem was the Karen Quinlan case, In re Quinlan, 70 N.J. 10, 57, 355 A.2d 647, 669, cert. denied, 429 U.S. 922 (1976), where the court concluded that there was no "reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed."


Id. at 185, 603 P.2d at 77.

UNIFORM BRAIN DEATH ACT (1980).
of all functioning of the brain including the brain stem, is dead.” The Harvard Medical School test, discussed by the Code commentators, defines “cessation of life” as “brain death” which occurs when there is “(1) unresponsiveness to normally painful stimuli; (2) absence of spontaneous movements or breathing; and (3) absence of reflexes.”

The court adopted the modern view and concluded that the victim had suffered brain death before the supports had been withdrawn, hence the defendant could properly be convicted of a homicide offense. No doubt, the victim was dead before the support systems were withdrawn, and the defendant was the one who killed him. Without any statutory guidelines as to the definition of death, however, all parties were acting under a severe handicap in predicting the result in the case, surely raising some due process concerns. It is just this sort of case which the Model Penal Code could and should reach. The failure to define the crucial term, “death,” is unfortunate, though perhaps not fatal. The President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, established by Congress in 1978, has just recommended that the states endorse the concept that human life ends when the brain stops functioning. The recommendation is receiving a good deal of attention and is likely to have a major impact in the near future on the law in this area. Still, it is both disappointing and surprising that the draftsmen of the Model Penal Code chose not to develop their own definition of this term.

It is, finally, worth noting that under the homicide definition, “human being” is a person “who has been born and is alive.” Such a definition maintains the earliest common law view that homicide offenses are only committed when the victim is born alive:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

One of the obvious reasons for so limiting the definition was to avoid

28 COMMENTARIES, supra note 1, at 10.
29 124 Ariz. at 185, 603 P.2d at 77.
30 The full statute is as follows:
An individual who has sustained either (1) irreversible cessation of circulatory and respiratory function, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.
31 This is particularly surprising in light of the approach taken by the Code in the murder and manslaughter sections. The draftsmen there were meticulous in their phraseology and attempted to specify the elements of the offenses. See infra text accompanying notes 45-138.
32 3 E. COKE, INSTITUTES 58 (1648).
dealing with the abortion question in the homicide area. "Although there may remain a role for the penal law in the field of abortion, there is at least a continuing necessity to avoid enmeshing this quite distinct problem in the law of homicide."

On this point the draftsmen and commentators are certainly correct. The legal issues surrounding abortion are complex and diverse, but they are distinct from those normally involved with the law of criminal homicide. It is preferable to deal with such issues apart from the homicide area.

In one area, though, the limited definition of human being raises some question, as recognized by the commentators. "Whatever one's evaluation of [abortion], it seems useful to distinguish abortion from the intentional killing of a fetus without the mother's consent. As a matter of policy, it may be thought appropriate to punish such conduct as murder."

Keeler v. Superior Court demonstrates this point very well. The defendant's former wife became pregnant by another man. One day, on an isolated mountain road the defendant encountered her, saw that she was pregnant and "pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows." There was little question that the defendant intended to do severe harm to both the mother and the fetus. The head of the fetus was found to be severely fractured, and it was delivered stillborn. The defendant was convicted under a statute which defined murder as "the unlawful killing of a human being, with malice aforethought."

The dissenting justices argued that the conviction was proper, for the question "whether a homicide occurred . . . would be determined by medical testimony regarding the capability of the child to have survived prior to the defendant's act." The majority of the California supreme court disagreed, finding that under the usual murder statute the legislature could not have intended to cover the defendant's actions. If it had so intended, the stat-

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33 Commentaries, supra note 1, at 12.
34 The abortion issues are dealt with in § 230.3 of the Code.
35 Commentaries, supra note 1, at 12.
37 Id. at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482.
38 After noticing that his former wife was pregnant, the defendant exclaimed, "I'm going to stomp it out of you." Id.
40 2 Cal. 3d at 641, 470 P.2d at 632, 87 Cal. Rptr. at 496 (Burke, C.J., dissenting). The medical testimony was clear that the fetus had an excellent chance of survival, but for the defendant's actions. "Baby Girl' Vogt, . . . had reached the 35th week of development, [and] had a 96 percent chance of survival . . . ." 2 Cal. 3d at 639-40, 470 P.2d at 630, 87 Cal. Rptr. at 494 (Burke, C.J., dissenting).
41 It is the policy of this state to construe a penal statute as favorably to the defendants as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable
ute "would deny him due process of law." 42

One could certainly draft a statute which does not deal with the abortion situation, but does make into a homicide offense the beating of a woman which results in the child being delivered stillborn. 43 What is perplexing about the commentators' view of such a statute is that they and the draftsmen have simply chosen not to deal with the sensitive question. Many judges and legislators have grappled with the issue of whether such a killing constitutes a homicide offense; 44 it is regrettable that the Code does not offer guidance in this difficult area.

**MURDER**

The Model Penal Code, section 210.2, provides that

(1) Except as provided in Section 210.3(1)(b), 45 criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

It is in the definition of murder that the Model Penal Code has made its greatest contribution. In an area fraught with confusion and contradiction, the draftsmen and commentators have sought to bring clarity and uniformity. On the whole, they have succeeded. At com-

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42 Id. at 631, 633-34, 470 P.2d at 624, 626, 87 Cal. Rptr. at 488, 490.
43 Id. at 639, 470 P.2d at 630, 87 Cal. Rptr. at 494.
44 Illinois and California have both passed statutes which preclude application of the homicide statute in cases where abortion was legally authorized. *See Cal. Penal Code § 187(b) (West Supp. 1981); Ill. Rev. Stat., ch. 38, § 9-1.1 (1981) (specifically referring to the new homicide offense of "feticide.").*
45 *See Commentaries, supra note 1, at 11-12.*
mon law, murder was the unlawful killing of another human being with "malice aforethought." The term "malice aforethought," often clipped to malice, has no specific definition suitable for use in the area of homicide. Instead, it is thought that killings in four situations evidence a sufficiently criminal mind as to constitute murder. First, of course, malice includes an intent to kill. Second, malice means an intent to inflict grievous bodily harm. Third, the term includes the state of mind present under the genteel terminology of "depraved heart" or "abandoned and malignant heart." This category covers those cases in which the defendant acted with extreme recklessness. The fourth situation, and the most difficult for this writer, consists of killings committed during the course of certain other crimes, felony murder. This clarity of categorization in the malice aforethought area may be more apparent than real, for states were hardly consistent in the application of the doctrine, while still others sought to embellish the term by statutory definition.

The confusion in this area was further compounded by the adoption of statutes dividing murder into degrees, a position first taken by the state of Pennsylvania in 1794. "The thrust of this reform was to confine the death penalty, which was then mandatory on conviction of any common-law murder, to homicides judged particularly heinous." The murder was deemed sufficiently horrible if the killing had been "perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing." While one might argue whether or not these standards were appropriate, it at least appeared clear what was meant by the statutory terminology. Unfortunately, the phrase "willful, deliberate or premeditated killing" in practice was not at all clear.

The leading discussion of the definition of the terms under first degree murder statutes is probably Judge Leventhal's opinion in Austin v. United States. There the defendant had brutally stabbed the victim to

46 Unlike, for instance, the definition of malice in the defamation area which refers to knowledge of the falsity or reckless disregard for the truth. See New York Times v. Sullivan, 376 U.S. 254 (1964).
47 The intent to kill will normally be murder unless committed in the heat of passion under the manslaughter statutes. See infra text accompanying notes 103-127.
48 See infra discussion at text accompanying notes 73-97.
49 The commentators refer to the Georgia code sections, since repealed, which defined the term as "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof" or implied malice "where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." Commentaries, supra note 1, at 17.
50 Id. at 16.
51 This reference excludes the felony murder provisions which were present in the statutes which otherwise divided murder into degrees.
52 382 F.2d 129 (D.C. Cir. 1967).
death, inflicting dozens of knife wounds all over her body. The defendant was convicted of first degree murder after the trial judge had instructed the jury that the deliberation and premeditation under the first degree murder statute could be “in the nature of hours, minutes, or seconds.” Judge Leventhal began by exploring the rationale for the first degree murder statute:

Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not.

What the legislature had in mind was “that the determination to kill was reached calmly and in cold blood rather than under impulse or the heat of passion and was reached some appreciable time prior to the homicide.” Thus, the trial judge’s instruction to the jury was erroneous; by referring to the premeditation element as one which could be committed in a matter of seconds, he had essentially converted virtually all murders into first degree murders, an intent the legislature could not have had.

*Austin* illustrates well the problems which the degree statutes created. The Model Penal Code approach rejects the degrees principle and instead provides a clear and healthy balance between the requirements of particular states of mind, and severe punishment for particular types

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53 The court stated to the jury:

It is your duty to determine from all of the facts and the circumstances which have been presented to you in this case that you may find surrounding the killing on April 24 . . . whether there was any reflection and consideration amounting to deliberation by the defendant . . . . Now if there was such deliberation, even though it be of an exceedingly brief duration, that is in itself, so far as the deliberation is concerned, is sufficient. Because it is the fact of deliberation rather than the length of time it required that is important. Although some time, that is there must be some time to deliberate in the mind of the defendant Austin the premeditation and the deliberation. As I have told you before, the time itself may be in the nature of hours, minutes, or seconds. But there must be the deliberation and the premeditation.

*Id.* at 133, n.1.

54 *Id.* at 134 (quoting *Bullock v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941)).

55 *Id.* at 134.

56 The court stated:

In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. These are the archtypes, that clarify by contrast. The real facts may be hard to classify and may lie between the poles. A sudden passion, like lust, rage, or jealousy, may spawn an impulsive intent yet persist long enough and in such a way as to permit that intent to become the subject of a further reflection and weighing of consequences and hence to take on the character of a murder executed without compunction and “in cold blood.”
of killings.\textsuperscript{57} As indicated earlier, under the traditional view of malice, murder was committed by a killing accompanied by an intent to kill, an intent to inflict great bodily harm, or a "depraved heart."\textsuperscript{58} In the abstract, the terms—at least the first two—may be straightforward. In practice, however, the terms were difficult to apply in the cases in which the actor probably knew that he would cause death or great bodily harm, but there was some question as to whether that result was his goal or his purpose. For instance, did the husband \textit{intend} to kill his wife when he ordered her into the river and she drowned?\textsuperscript{59} Did the "stepmother" \textit{intend} to kill her six year old girl when she "whipped" the child continuously?\textsuperscript{60} Similarly, did the defendant \textit{intend} to inflict grave bodily harm on his wife when he struck her and she bumped her head on the car?\textsuperscript{61} In these cases the defendants certainly knew of the likely consequences of their acts, but some doubt must be raised as to whether they intended such consequences.

The Model Penal Code avoids this fine distinction between intent and knowledge by allowing for a murder conviction if the killing was done in a purposeful or knowing fashion. The commentators properly remark that for homicide purposes there ought not to be any distinction between an intentional killing and a knowing killing. The Code thus rejects those statutes which so distinguish, either with regard to the definitions of the offenses or the grading of them for purposes of punishment.\textsuperscript{62} The commentators also make clear the nature of proof required for intent, purpose or knowledge. That is, under the Code the judge may not instruct the jury to presume that the defendant intended

the natural or probable consequences of his acts. Liability under Section 210.2(1)(a) may not rest merely on a finding that the defendant purposefully or knowingly did something which had death of another as its natural and probable consequence. Rather, the prosecution must establish that the defendant engaged in conduct with the conscious objective of causing death of another or at least with awareness that death of another was practically certain to result from his act.\textsuperscript{63}

This conclusion is quite proper; murder is the highest homicide offense precisely because the defendant's culpability is the greatest. A murder

\begin{footnotes}
\item[57] \textit{Id.} at 137. The punishment provisions of the Code are not treated in this article. A person convicted of murder, however, may be sentenced to death under certain circumstances pursuant to § 210.6.
\item[58] Or by a killing during the course of the commission of a felony. \textit{See infra} text accompanying notes 73-97.
\item[59] Yes, he knew she could not swim. State v. Myers, 7 N.J. 465, 81 A.2d 710 (1951).
\item[60] Yes. State v. Lamborn, 452 S.W.2d 216 (Mo. 1970).
\item[61] Yes, he should have immediately taken his wife to the hospital. People v. Geiger, 10 Mich. App. 348, 159 N.W.2d 383 (1968).
\item[63] \textit{Id.} at 20-21.
\end{footnotes}
charge should not stand upon so tenuous a ground as what somebody else knew, or what a natural consequence should have been. Of course, direct evidence of intent or knowledge is not required, and the jury may be told that it can infer the necessary state of mind from the acts of the defendant. That, however, is quite different—and far more justifiable—than an instruction as to presumptions of natural and probable consequences.

Suppose the defendant does not intend to inflict grievous bodily harm, does not intend to kill, and does not know that the death will occur. Should the defendant be convicted of murder under other circumstances? Even today, few people would contest the murder conviction of the defendant who shoots a gun into a room,64 shoots it into a moving automobile,65 or takes a small child and literally throws her into her bedroom.66 When death occurs the actor is seen as greatly at fault, even though he may not have intended that death would result, or may not have known that the victim would die. He is held for murder because he consciously disregarded a grave risk to a fellow human being. In common law terms, he has evidenced an “abandoned and malignant heart.” The Code follows this rationale, but seeks to clarify the meaning of the rule. The defendant can be held for murder when the act is “committed recklessly under circumstances manifesting extreme indifference to the value of human life.” Though the language is still a bit hazy, it is a vast improvement over the common law terminology67 and it achieves its “primary purpose of communicating to jurors in ordinary language the task expected of them.”68

Two points should be made concerning the extreme indifference formulation. First, it is not indifference to any risk which will give rise to a murder charge in this context. It is a risk which demonstrates the defendant’s total disregard for human life; it is the shooting of the gun, the brutal treatment of the young child. Any action short of this “extreme indifference” can still be considered as a homicidal act, but only at the level of manslaughter rather than murder.69 Second, it should be

64 People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924).
65 Hill v. Commonwealth, 239 Ky. 646, 40 S.W.2d 261 (1931).
67 The language in the Code is certainly an improvement over other academic efforts in the area. One law professor has defined murder to include unintentional homicide “by an act so extremely dangerous and disregardful of the lives and safety of others as to be wantonly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances.” Moreland, A Suggested Homicide Statute for Kentucky, 41 Ky. L.J. 139, 146 (1953). Another has summarized the common law version of unintentional murder as involving “wanton and willful disregard of an unreasonable human risk.” R. Perkins, Criminal Law 36-37, 46 (2d ed. 1969).
68 Commentaries, supra note 1, at 25.
69 Section 210.3 defines manslaughter as an act which is “committed recklessly.”
stressed that the murder charge can only be sustained on a showing of conscious disregard of the risk of harm to others. It is not enough to prove that the defendant should have been aware of the probable consequences, or that other people knew or would have known of the consequences. The murder charge requires a very high degree of culpability: the actual awareness of this very great risk. The famous English case of Regina v. Ward,70 therefore, would not be valid under the Code, as noted by the commentators. The defendant was a man of “sub-normal” intelligence who was charged with the murder of a small child. He testified that he had picked up the crying child and shook her until she had stopped. He had no intention to harm her seriously and apparently did not understand that he was harming her. The thrust of his defense was rejected by the trial judge who instructed the jury that

if, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did, then, members of the jury, if you are satisfied about that, he is guilty of murder.71

Under the Code, this instruction is erroneous due to the reference to the reliance on the standard of conduct of a “reasonable man.”72

The commentators state several times that under the Code a defendant can only be convicted of murder if he or she killed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. The felony murder rule as such is not found in the Code. Still, the rule may have been adopted sub silento by the draftsmen in the form of the following presumption: “Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse . . . arson, burglary, kidnapping or felonious escape.” To determine if the rule finds new life in the Code we must first examine the traditional felony murder doctrine.

At common law, all defendants committing a felony were held for murder if the killing occurred during the course of that felony. Problems arose in the application of the rule. There have been cases in

70 [1956] 1 Q.B. 351.
71 Id. at 354-55.
72 As the commentators point out, Parliament overruled Ward in the Criminal Justice Act of 1967, ch. 80, § 8:

A court or jury, in determining whether a person has committed an offense,—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.
which the issue was whether a "killing" had occurred if the victim of the crime dropped dead from a heart attack.\textsuperscript{73} In other cases the defense contended that the felony murder rule did not apply unless the killing was in furtherance of the felony.\textsuperscript{74} In numerous cases the defendants asserted that the killing was not during the course of the crime because the death occurred during the escape portion of the criminal endeavor.\textsuperscript{75} Still, in virtually every American jurisdiction\textsuperscript{76} the rule was a well established alternative to the other forms of malice aforethought for purposes of proving murder.

The purpose of the felony murder rule has never been entirely clear. Chief Justice Traynor stated that it was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."\textsuperscript{77} At a time when all felonies were punishable by death "it made little difference whether the actor was convicted of murder or of the underlying felony because the sanction was the same."\textsuperscript{78} A broad based felony murder rule is indefensible in the modern world, where all kinds of acts which are not particularly dangerous to life and are not given severe penalties are designated felonies.\textsuperscript{79} As the commentators properly remark, under the rule, the "homicide, as

\textsuperscript{73} People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, \textit{cert. denied}, 400 U.S. 819 (1969) ("So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. In this respect, the robber takes his victim as he finds him.").

\textsuperscript{74} See, e.g., Commonwealth v. Waters, 491 Pa. 85, 92, 418 A.2d 312, 316 (1980) (it was "error for the trial judge to refuse to instruct the jury that the state was required to show the conduct causing the death was done in furtherance of the design to commit the felony.").

\textsuperscript{75} See, e.g., Whitman v. People, 161 Colo. 110, 420 P.2d 416 (1966) (felony murder rule applied to killings which occurred during the escape from the commission of an offense).

\textsuperscript{76} Until the last decade, only Ohio had abandoned the felony murder rule. As pointed out by the commentators, however, vestiges of the rule remain even in Ohio.

A close relative of the felony-murder rule is continued, however, under the label of imputed intent. A person who joins with another in a crime of violence is presumed to have agreed to whatever acts may be necessary to accomplish the criminal objective. Thus, each participant in an armed robbery may be presumed to have had a purpose to kill in connection with an unplanned but foreseeable homicide committed incident to the robbery.

\textit{Commentaries, supra} note 1, at 33 n.80.


\textsuperscript{78} \textit{Commentaries, supra} note 1, at 31 n.74, states:

The primary use of the felony murder rule at common law therefore was to deal with a homicide that occurred in furtherance of an attempted felony that failed. Since attempts were punished as misdemeanors, . . . the use of the felony murder rule allowed the courts to punish the actor in the same manner as if his attempt had succeeded. Thus, a conviction for attempted robbery was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death.

\textsuperscript{79} In Illinois, for instance, the following offenses are classified as felonies in the criminal code. \textit{Ill. Rev. Stat.} ch. 38, \S 28-1.1 (1981) (syndicated gambling); \S 29-1, 29-2 (offering or accepting a bribe); \S 31-4 (obstructing justice); \S 32-3 (subornation of perjury); \S 32-8 (tampering with public records); \S 21-1 (criminal damage to property); and \S 17-3 (forgery).
distinct from the underlying felony, was thus an offense of strict liability. It is difficult, indeed, to justify a murder conviction under such a strict liability rationale. As a practical matter, there has been no evidence to demonstrate that the felony murder rule serves a useful purpose in actually deterring felons from killing negligently or accidentally. More substantively, "it remains indefensible in principle to use the sanctions that the law employs to deal with murder unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life." 

State legislators and judges have recognized the validity of the criticism in the Commentaries and have stepped back from the formerly broad view of the felony murder rule. As the commentators discuss, the rule has been limited in a number of significant ways, whether by statute or court decision. In some states only particularly dangerous felonies are covered under the rule. In other states, the felony must be one which is independent of the homicide itself. Hence, assault with a deadly weapon could not be the base felony under the rule because the assault is an offense included in the charge of homicide. In some jurisdictions the punishment has been downgraded. Still other states have flatly rejected the felony murder rule. Foremost of these jurisdictions is the state of Michigan which declared its position in the case of People v. Aaron. The state supreme court first looked to "the most basic principle of the criminal law in general . . . criminal liability for causing a

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80 Commentaries, supra note 1, at 31.

81 Indeed, the evidence is somewhat to the contrary. "There is no basis in experience for thinking that homicides which the evidence makes accidental occur with disproportionate frequency in connection with specified felonies." Commentaries, supra note 1, at 38 (emphasis in original). The statistical evidence cited by the commentators shows that the number of all homicides which occur during the course of robbery, burglary, and rape is somewhat lower than might otherwise be expected. Id. at 38 n.96.

82 Id. at 38-39.

83 A number of codes specify the felonies which can be the basis for the rule. See, e.g., Ill. Rev. Stat. ch. 38, § 9-1 (1979). Some courts have attempted to limit the felony murder rule to the felonies which, in the abstract, are inherently dangerous to human life. For criticism of the rule, see Commentaries, supra note 1, at 35.


85 Alaska, Louisiana, New York, Pennsylvania, and Utah have reduced the felony murder crime to second degree murder. See discussion in People v. Aaron, infra, 409 Mich. 672, 689, 299 N.W.2d 304, 315 (1980).

86 Even in those states which have not acted in such drastic fashion, severe restrictions have been imposed with respect to the foreseeability of the offense, especially with regard to killings not directly caused by the defendant or a co-defendant. See, e.g., State v. Williams, 254 So. 2d 548 (Fla. Dist. Ct. App. 1971); Jackson v. State, 92 N.M. 461, 589 P.2d 1052 (1979). Contra, People v. Hickman, 59 Ill.2d 89, 319 N.E.2d 511 (1974); Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979).

87 409 Mich. 672, 299 N.W.2d 304 (1980).
particular result is not justified in the absence of some culpable mental state in respect to that result." 88 The court had little difficulty in concluding that

[t]he most fundamental characteristic of the felony-murder rule violates this basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons. The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony-murder rule thus "erodes the relation between criminal liability and moral culpability." 89

The court then speculated that the impact of the abolition of the felony murder rule would be limited:

From a practical standpoint, the abolition of the category of malice arising from the intent to commit the underlying felony should have little effect on the result of the majority of cases. In many cases where felony murder has been applied, the use of the doctrine was unnecessary because the other types of malice could have been inferred from the evidence.

Abrogation of this rule does not make irrelevant the fact that a death occurred in the course of a felony. A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. . . . Thus, whenever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony, . . . in order to establish malice the jury may consider the "nature of the underlying felony and the circumstances surrounding its commission."

If the jury concludes that malice existed, they can find murder. . . .

As previously noted, in many circumstances the commission of a felony, particularly one involving violence or the use of force, will indicate an intention to kill, an intention to cause great bodily harm, or wanton or willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. Thus, the felony-murder rule is not necessary to establish mens rea in these cases. 90

While few courts or legislatures have gone as far as the Aaron court, 91 it is beyond dispute that the modern trend is for severe limitation of the traditional felony murder rule. One would, therefore, hope for and expect repudiation of the rule in the Model Penal Code and its Commentaries. The rule is expressly repudicated, but the essence of it seems to survive. The Code "creates a presumption of the required reck-

88 Id. at 708, 299 N.W.2d at 316.
89 Id., 299 N.W.2d at 317.
90 Id. at 729-30, 299 N.W.2d at 327. See also Commentaries, supra note 1, at 37 ("For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule.").
91 In addition to Ohio, the states of Kentucky and Hawaii have specifically abolished the felony murder doctrine. See discussion in People v. Aaron, 409 Mich. at 690, 299 N.W.2d at 314.
lessness and extreme indifference, however, if a homicide occurs during the commission or attempted commission of robbery, sexual attack, arson, burglary, kidnapping, or felonious escape." This presumption also applies to the person who is an accomplice to the commission of one of the specified crimes. The important question is whether this presumption differs in material form from the felony murder.

The Model Penal Code's approach is different from the traditional rule in that the jurors are said to be free to disregard the "presumption." Thus, the commentators conclude that the effect of the Code provision "is to abandon felony murder as a separate basis for establishing liability for homicide." Two responses must be made to this conclusion. First, there is considerable doubt whether the jurors will disregard the presumption, especially in cases in which no independent evidence is offered as to the recklessness state of mind. That is, as I read the presumption, the jurors may find (indeed, are encouraged to find) the necessary state of mind with no evidence other than the commission of the named felonies. This looks suspiciously like the felony murder rule. Second, and more fundamentally, what possible basis can exist for the presumption here? The commentators refer to the presumption "as a concession to the facilitation of proof." If, however, the felony murder rule is wrong because it fails to require "a finding that the actor's conduct manifested an extreme indifference to the value of human life," it would seem that the presumption is just as wrong. A finding of extreme indifference is required, but that requirement can be met merely by a showing that the defendant or a co-defendant committed a particular felony. The draftsmen and commentators remark that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find," yet it is also hard to find a principled argument in favor of the presumption in the Code.

**Manslaughter**

The Model Penal Code, section 210.3, provides that

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92 Commentary, supra note 1, at 29.
93 Id. at 30. It is doubtful that the commentators mean to continue using the term "pre- sumption" in this context. It appears more likely that they intend to use the term "inference" which would allow the jury to reject the evidence with no contrary showing. If they truly mean presumption in the sense that the burden of proving this element (recklessness) is on the defendant, serious constitutional questions would have to be raised in light of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977). See also infra note 124.
94 Commentary, supra note 1, at 30.
95 Id.
96 Id. at 39.
97 Id. at 37.
Criminal homicide constitutes manslaughter when:
(a) it is committed recklessly; or
(b) a homicide which would otherwise be murder is committed
under the influence of extreme mental or emotional disturbance for
which there is reasonable explanation or excuse. The reasonableness
of such explanation or excuse shall be determined from the viewpoint of a
person in the actor's situation under the circumstances as he believes
them to be.

At the time the Model Penal Code was drafted the state of the law
with respect to the offense of manslaughter was muddled, to say the
least. Some states divided the crime into two types, voluntary and invol-
untary. Other states did not even attempt to define the crime, simply
incorporating the common law offense. At common law, manslaughter
was a "catch-all" category covering homicides which were not consid-
ered murder. This usually involved intentional killings accompanied by
adequate provocation and reckless killings that did not rise to the level
of "depraved heart" murder. Still other states adopted statutes which
divided the crime into degrees. Hence, in a very real sense, the major
contribution of the draftsmen here was to bring some uniformity to the
crime in those states which have adopted the Code.

The first type of manslaughter recognized by the Code is the reck-
less killing of another. Carefully distinguishing negligent homicide, the
Code mandates a showing that the defendant "consciously disre-
gards a substantial and unjustifiable risk." It is considerably more diffi-
cult to prove this reckless conduct than to prove negligent acts; the
section requires behavior which is "a gross deviation from the standard
of conduct that a law-abiding person would observe," and proof is re-
quired of a "conscious disregard of perceived homicidal risk." If the
risk creation demonstrates "extreme indifference," the crime is murder
rather than manslaughter.

The second type of manslaughter is the killing in the heat of pas-

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98 The traditional view is that voluntary manslaughter is committed when there is an
intent to kill, but no malice aforethought. Involuntary manslaughter is committed without
this intent to kill, but upon otherwise culpable behavior. The division, however, was not so
explicitly recognized as in many of the statutory provisions. See Commentaries, supra note
1, at 44-48.

99 This form of manslaughter thus required more culpability than for ordinary civil neglig-
ence, but less than for the "abandoned heart" murder. Id. at 44.

100 Foremost among these statutes was the New York law which allowed for first degree
manslaughter when the killing occurred in the heat of passion in a cruel and unusual manner
and second degree manslaughter in the heat of passion, but not by means either cruel or

101 Section 210.4 states: "Criminal homicide constitutes negligent homicide when it is
committed negligently." The discussion of the commentators in the section is quite helpful,
but reference to it in this article is deleted because of space limitations.

102 Commentaries, supra note 1, at 53.
sion as a result of severe provocation. Wharton states the policy for allowing a lesser penalty even though the killing was intentional: "As a concession to human frailty, a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter." The common law had difficulties defining this aspect of the crime and applying it in a manner consistent with the underlying policy. The greater the heat of passion and the more severe the provocation, the greater chance that the crime would be considered manslaughter rather than murder. The oft-stated theory was that if this was the kind of incident which would cause even a reasonable person to lose self-control the law ought not hold the defendant to the sanction for murder. The problem, though, was that "a reasonable person does not kill even when provoked." As explained by Wechsler and Michael, the policy rationale stated above is nonetheless served by allowing mitigation to the manslaughter charge:

[T]he more strongly [most persons] would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.

The Model Penal Code has sought to effectively eliminate three major problems involved in applying the provocation rules: first, the requirement that the provocation be sufficient to affect even the reasonable person; second, the view that words alone were insufficient to constitute adequate provocation; and third, the provision that there could be no break in time between the provocation and the defendant's action.

Determining what a reasonable person would or would not do under difficult circumstances has never been an easy task for finders of fact, as seen in the many conflicting negligence cases in tort law. The reasonable person standard does, however, allow for a specific objective standard upon which persons could rely. In the criminal context, however, some question was raised as to whether the reasonable person standard should be used to determine adequate provocation. As noted by the commentators, "[a] taunting attack that would seem trivial to the

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103 2 WHARTON'S CRIMINAL LAW § 153 (14th ed. 1978).
104 COMMENTARIES, supra note 1, at 56.
106 Learned Hand attempted to devise a formulation to assist in the tort negligence decision. He wrote that the negligence determination "is a function of three variables: (1) The probability [of the result]; (2) the gravity of the resulting injury . . . ; (3) the burden of adequate precautions." He went on to explain: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947).
ordinary citizen may be extremely threatening to the blind man."\textsuperscript{107} \textit{Commonwealth v. Stasko}\textsuperscript{108} demonstrates well the refusal to consider the individual traits of the defendant which might have led him to be provoked. The defendant attempted at trial to offer medical evidence to show his "tendency to have a short temper and erupt in sudden rages."

The trial judge's refusal to allow the evidence into the record was affirmed:

The purpose of the testimony was to show that, in the case of this particular accused, there was sufficient provocation for the attack. This evidence was clearly inadmissible: "Our law is quite explicit that the determination of whether a certain quantum of provocation is sufficient to support the defense of voluntary manslaughter is purely an objective standard. . . ." The test for adequate provocation is "whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection."\textsuperscript{109}

Indeed, in one case evidence was refused, even though the court conceded that the evidence would have shown the defendant to be "a man with a low intelligence quotient and a history of mental disturbance . . . [as the] objective standard precludes consideration of the innate peculiarities of the individual defendant."\textsuperscript{110}

The Code seeks to start anew in this area, for it "sweeps away the rigid rules that limited provision to certain defined circumstances. Instead, it casts the issue in phrases that have no common-law antecedents and hence no accumulated doctrinal content."\textsuperscript{111} Manslaughter is shown when the killing is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." While the Code does retain the reasonable person standard, this requirement may be met by looking to "the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." It thus appears that the Code strikes a healthy balance between the opposing positions. Some reasonable person standard must be met, so that the section "preserves the essentially objective character of the inquiry and erects a barrier against debilitating individualization of the legal standard."\textsuperscript{112} Still, the reasonableness must be assessed "from the viewpoint of a person in the actor's situation." "[I]t is clear that personal handicaps and some external circumstances must be taken

\textsuperscript{107} \textit{COMMENTARIES}, \textit{supra} note 1, at 56.
\textsuperscript{108} 471 Pa. 373, 370 A.2d 350 (1977).
\textsuperscript{109} \textit{Id.} at 384, 370 A.2d at 356 (quoting \textit{Commonwealth v. McCusker}, 448 Pa. 382, 389-90, 292 A.2d 286, 289-90 (1972)).
\textsuperscript{111} \textit{COMMENTARIES}, \textit{supra} note 1, at 61.
\textsuperscript{112} \textit{Id.} at 62.
into account. Thus, blindness, shock from traumatic injury, and extreme grief are all easily read into the term 'situation.'

The common law also had trouble defining the sort of external activity which would give rise to the provocation defense. The rule traditionally was that "words alone, however scurrilous or insulting, will not furnish the adequate provocation required." The major exception to the "mere words" rule, as noted by the commentators, "concerned informational words disclosing a fact that would have been adequate provocation had the actor observed it himself," such as the case in which the defendant is told, "I just killed your child." Under the code, no explicit rule is promulgated with respect to "mere words." The Code draftsmen recognized that the important question "cannot be resolved successfully by categorization of conduct. It must be confronted directly on the facts of each case." In most cases words alone will not be sufficient provocation. In the highly unusual case, however, mere words might be sufficient to cause even the reasonable person to lose self-control.

At common law a manslaughter claim was not allowed if there was a cooling off period between the provocation and the killing. The final contribution of the Code in this area is the elimination of this "sudden provocation" element. The reason for the strict rule was that "[f]or the reasonable man, at least, passion subsides and reason reasserts its sway as the provoking event grows stale." The most famous case in the area, discussed by the commentators, is State v. Gounagias where "the deceased committed sodomy on the unconscious defendant and subsequently spread the news of his accomplishment. Those who learned of the event taunted and ridiculed the defendant until he finally lost control and killed his assailant some two weeks after the sodomy."

This theory of the cumulative effect of reminders of former wrongs, not of new acts of provocation by the deceased, is contrary to the idea of sudden anger as understood in the doctrine of mitigation. In the nature of the thing sudden anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation sufficient in law to reduce

113 Id.
115 Commentaries, supra note 1, at 58.
116 Id. at 61.
117 As in People v. Borchers, 50 Cal. 2d 321, 325 P.2d 97 (1958), where the wife told her husband, the defendant, that she had been unfaithful, asked him to kill her and her four-year-old child, and taunted him by calling him a "chicken."
118 Commentaries, supra note 1, at 59.
119 88 Wash. 304, 153 P. 9 (1915).
120 Commentaries, supra note 1, at 59.
intentional killing from murder to manslaughter...  

The problem with the rule is that the law should not necessarily distinguish between the person who instantly reacts to the provocation and the person who broods for a week or two and then responds. The Code recognizes this, and does not set out a specific rule with respect to the suddenness of the situation. The validity of the Code's position is seen in cases such as *People v. Berry*.

The victim in that case, defendant's wife, was a suicidally inclined young woman who pursued her death wish by "sexually arousing him and taunting him into jealous rages in an unconscious desire to provoke him into killing her and thus consummating her desire for suicide." For a two week period she continually harassed defendant with sexual taunts and incitements, and repeated references to her involvement with another man. Finally, the defendant strangled her to death. Under the "sudden passion" rule the defendant would not have been able to prove his defense. The court, however, recognized that the

two-week period of provocative conduct by his wife... could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion...

The Attorney General contends that the killing could not have been done in the heat of passion because there was a cooling period... However, the long course of provocative conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past, reached its final culmination...

The Model Penal Code treatment of manslaughter is a "modified

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121 88 Wash. at 314, 153 P. at 14. See also People v. Wilson, 3 Ill. App. 3d 481, 486, 278 N.E.2d 473, 477 (1972) ("To reduce an unlawful killing from murder to voluntary manslaughter, the sudden and intense passion resulting from serious provocation cannot be followed by a period of time sufficient for the passion to cool and the voice of reason to be heard.").

122 18 Cal. 2d 504, 556 P.2d 777, 134 Cal. Rptr. 415 (1976).

123 Id. at 514, 556 P.2d at 780, 134 Cal. Rptr. at 418.

124 The Model Penal Code requires the government to prove the elements of the voluntary manslaughter offense, though some states required the accused to prove the provocation claim by a preponderance of the evidence. As the commentators point out, there has been some question as to the constitutionality of placing this burden on the defendant. In Mullane v. Wilbur, 421 U.S. 684 (1975) the Supreme Court struck down a state statute which required the defendant to prove provocation by preponderance of the evidence. But see Patterson v. New York, 432 U.S. 197 (1977) where the Court upheld the constitutionality of requiring the defendant to shoulder the burden under a state statute which referred to emotional disturbance. The Court found that the emotional disturbance element, unlike the provocation aspect in *Mullane*, raised an affirmative defense. "The Model Code takes... the... position advanced as a constitutional rule by Mr. Justice Powell's dissent in *Patterson*, that, once the defendant has come forward with some evidence of extreme emotional disturbance, the burden of proving its non-existence should shift to the prosecution." Commentaries, supra note 1, at 63-64 n.58. See also supra note 93.

125 18 Cal. 3d at 515-16, 556 P.2d at 780-81, 134 Cal. Rptr. at 419.
and substantially enlarged version of the rule of provocation.”126 This expansion is thoroughly justified, however, for it realistically allows the important questions regarding mitigation of the crime to be placed before the jury without any strict categories as to time or type of behavior required. It allows the jury to apply a standard which is both subjective and objective. In short, it is a substantial improvement over the uncertainties of the common law.127

I turn now to another situation. Suppose the defendant shoots and kills the victim, believing that the victim was about to shoot and kill him. The defendant’s belief, though genuinely held, is unreasonable. Had this mistaken belief been reasonable, the defendant would be able to raise a complete, or “perfect,” claim of self-defense. Under the traditional provocation rule, the hypothetical defendant would be convicted of murder because he had the intent to kill and could not claim to have been aroused by the “heat of passion.” Recognizing this “as an indefensible position”128 the Code has adopted a version of the “imperfect” right of self-defense. The standard version, as enacted in Illinois, focuses attention on the defendant’s sincere, but unreasonable belief: “A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . , but his belief is unreasonable.”129 The Code treatment of the im-

126 COMMENTARIES, supra note 1, at 60.

127 The Commentaries also discuss the diminished responsibility concept. The commentators clearly support the notion that “all evidence logically relevant to establishing the actor’s state of mind” should be admissible. COMMENTARIES, supra note 1, at 66. This, of course, reiterates the point that the individual characteristics of the defendant ought to be considered to some extent in determining provocation and the reaction of the defendant. With respect to the question of allowing diminished responsibility to reduce murder to manslaughter, however, the commentators are far less certain:

Recognizing diminished responsibility as an alternative ground for reducing murder to manslaughter undermines this scheme. Unlike provocation, diminished responsibility is entirely subjective in character. It looks into the actor’s mind to see whether he should be judged by a lesser standard than that applicable to ordinary men. It recognizes the defendant’s own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt.

Id. at 71. The commentators conclude that the Code does not recognize diminished responsibility as a distinct category of mitigation, but “leaves the issue, together with many others, as part of the generic problem of determining the extent to which the actor’s individual characteristics should be taken into account in the formula.” Id. at 73.

128 Id.

129 ILL. REV. STAT. ch. 38, § 9-2(b) (1979). See also People v. Joyner, 50 Ill. 2d 302, 309, 278 N.E.2d 756, 759 (1972):

Occasionally a defendant who raises a defense of self-defense to a charge of murder is convicted of manslaughter . . . . The difference between a justified killing under self-defense and the one not justified, amounting to voluntary manslaughter, is that in the former instance the belief that the use of force is necessary is reasonable under the circumstances, and in the latter, the belief is unreasonable.
perfect defense is preferable to this version simply because it is more precise. It allows for a manslaughter conviction in the situation discussed above, but specifies that the defendant could be guilty of criminal homicide if his belief was formed recklessly or negligently.  

The final area in the law of manslaughter in which the Code has made an important contribution is the misdemeanor-manslaughter rule, an offshoot of the felony murder rule. As with felony murder, the broad scope of the rule provided that it was a homicide offense if the defendant caused a death while committing, or attempting to commit, a crime. Although a number of courts have narrowly construed the rule it is, nevertheless, “objectionable on the same ground as the felony-murder rule. It dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor’s state of mind.” To be sure, it is even worse than the felony murder rule, for the defendant may be charged with a homicide offense even though he may not have committed any serious offense and might not be chargeable with generally reckless conduct.

*People v. Nelson* is perhaps the most extreme application of the misdemeanor-manslaughter rule. The defendant was an elderly man, formerly a tenant, who eventually became the owner of his building. Two persons were killed in a fire which occurred in the building. The government showed that a violation of the building law, a misdemeanor, caused the deaths. The defendant contended that he did not know of the building law and thus had not acted in a reckless fashion. The trial judge would not let the jury consider the issue of the defendant’s knowledge, and the Court of Appeals of New York affirmed. The dissenter disagreed:

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130 It is difficult to imagine many situations in which the defendant would be able to state a legitimate self-defense argument when he was reckless as to the mistaken belief in the necessity. If recklessness requires a conscious disregard of a substantial risk with respect to the necessity of defense, the prosecution may properly argue that he truly did not believe he was entitled to use force and hence ought to be guilty of murder.

131 For example, some states apply the rule only to misdemeanors *mala in se* but not to misdemeanors *mala prohibita*. Others refuse to apply the rule where the underlying crime is one of strict liability. *But see infra* text accompanying notes 134-38. The commentators discuss these limitations in some detail. *COMMENTARIES*, *supra* note 1, at 76-77.

132 *Id.* at 77.

133 In a situation involving a serious crime such as rape or armed robbery, it would not be difficult for the finder of fact to conclude that the defendant had consciously disregarded a very serious risk, proven by his involvement in such a violent crime. The death of the victim could more justifiably be considered criminal homicide.


135 The court stated:

It is undeniable that a tremendous duty is placed upon the owners and those in charge of property under the applicable section of the Multiple Dwelling Law; however, it is quite apparent that the Legislature intended the burden to be onerous so that owners would be impressed with the consequences flowing from violation of the statute, which viola-
If awareness of the misdemeanor is held to be irrelevant, the basis for guilt of manslaughter is eliminated. . . .

"... When there is a general intent to do evil, in other words, of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong."

Nelson demonstrates how indefensible the misdemeanor-manslaughter rule is. Even though the defendant may have committed the substantive crime, it is wrong to hold him for a homicide offense without a showing of a culpable state of mind. Unlike the presumption adopted in the felony-murder area, the approach of the Code draftsmen here is straightforward. They expressly abolish the misdemeanor-manslaughter rule. This approach is quite proper. If the defendant acted in an otherwise reckless or negligent fashion, he may be charged with homicide. If he has not acted culpably, even though guilty of a misdemeanor, he should not be brought within the reach of a manslaughter statute.

CONCLUSION

The approach of the Model Penal Code in the area of criminal homicide is illustrative of the general approach of the Code. There are several difficult subjects which the draftsmen have chosen to deal with in a direct and clear fashion; others have been avoided or obfuscated. For example, the draftsmen were careful to define with clarity the elements of the crime of manslaughter, avoiding the common law difficulties. They explicitly rejected those murder statutes which had divided the offense into degrees. On the other hand, they have failed to come to terms with important definitions such as "death," they have refused to confront the possibility of a feticide statute, and have only partially responded to the intense criticism of the felony murder.

The great worth of the Code cannot, however, be evaluated by looking to such specifics. The Code has had tremendous influence on the criminal law in this country and has brought considerable clarity

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136 Id. at 239, 128 N.E.2d at 395 (Van Voorhis, J., dissenting) (quoting 1 WHARTON'S CRIMINAL LAW § 157 (12th ed. 1932)).

137 See supra text accompanying notes 73-97.

138 Related to the misdemeanor manslaughter rule is the so-called intent to injure rule. As stated by the commentators, many jurisdictions have provisions in which "one who caused the death of another by a simple battery was generally guilty of manslaughter or of involuntary manslaughter where that was a separate category, however improbable the fatal result." COMMENTARIES, supra note 1, at 78. The imposition of homicide sanctions makes little sense absent some reckless or negligent conduct apart from the battery itself. The Code rejects the intent to injure rule and simply focuses on whether the defendant's action is reckless or negligent in determining which, if any, homicide category should be applied.
and uniformity to an area of the law in which both were notoriously absent. The efforts of Professors Low and Jeffries will serve further to clarify and explain the rationale for the Code, allowing lawyers, judges and legislators to understand the positions taken by the draftsmen and intelligently to decide whether such positions are supportable. The commentators’ efforts are both substantial and significant. By updating the explanations for the Code provisions they have provided an invaluable aid to those engaged in the administration of criminal justice.

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Those in the business of crisis prediction should have little difficulty recognizing one that’s as sure a bet as any for the 1980s—the crisis of America’s burgeoning prisons. The criminal justice system responded to the crime explosion of the 1960s and ’70s, a period in which the homicide rate doubled, with an unprecedented expansion in our prison and jail populations—from 356,000 in 1970 to 530,000 by 1977. With most indicators pointing to a continuation of the upward trend in inmate populations, only the most optimistic and least informed could not be concerned about the potential for upheaval in our nation’s prisons by 1990.

Under such circumstances, we would be foolish not to do our best to understand the lessons of previous episodes of turmoil in our prisons, as well as a few episodes of success that have occurred here and there, so as to avoid repeating past errors and make use of what has worked. In sharing his treasure of personal experience as a prison administrator in the states of New York, Washington, and California, Richard McGee, in Prisons and Politics, provides the means to enable others to understand such lessons. McGee’s account of the problems of prison administration and how he has dealt with them is both thoughtful and thorough. His grasp of the fundamental issues is deep:

Public officials . . . know instinctively that their prisons are unflattering reflections of their cultures. All societies have difficulty reconciling their desire to be humane and compassionate with their exasperation with overt antisocial behavior. To hurt and heal, to banish and forgive, to destroy and rebuild: these difficult and contradictory concepts come face to face in their starkest form in prison. (p. 84.)

McGee’s credentials in prison administration are second to none.
In a profession in which the best one normally does is to avoid catastrophe and survive for a couple of years, McGee has managed to draw the highest praise as a public official. His decades of tenure and accomplishment as California’s first Director of the Department of Corrections alone attest to his superior administrative skill. Governor Earl Warren wrote in 1974 that he had never had a better administrator work for him in his fifty-plus years of public service.

McGee understands that inmates are human beings, yet that prisons have a responsibility to control them. He understands that the case-by-case perspective that the public is exposed to by the mass media and in detective stories provides no basis for effective management, yet that the fine print of statistical tables of government reports has its limitations too. He understands well the irrational public pressures to simultaneously reduce crime, reduce problems in prisons, and reduce prison budgets: “punish, but be kind and do it cheaply.” (p. 78.) He understands the absolute importance of order and efficiency in prison administration: “Of all institutions, public or private, probably none has the imperative to be organized as tightly and operated as efficiently as the prison. Not to do so inevitably results in political and legal attacks from the outside, or blowups and insurrections from within.” (p. 78.)

Above all, Prisons and Politics demonstrates an understanding that effective prison administration demands high levels of consciousness about both internal prison management and the relationships between state correctional agencies and the external political forces that control those agencies: the governor, the state legislature, the press, and others. The book gives a documentary account of McGee’s experience in dealing with each of these forces and offers a prescription for the prison administrator in dealing with each. Separate chapters on the administrator’s relations with the executive branch, legislative branch, and the media conclude with lists of personally time-tested dos and don’ts for the administrator.

McGee also describes the major obstacles to operating successful prison industries (e.g., opposition by organized labor) and the importance of nonetheless attempting to do so; dealing with prison congestion (there are no easy answers, especially for short-term congestion problems); and the existence of irrational and inequitable sentencing practices and their harmful effects on the process of clarifying the role of the prison.

While the book is less a scholarly discourse on corrections than it is a presentation of McGee’s insights on prison administration that derive from his experience, McGee’s approach is nonetheless objective. Indeed, his success as an administrator may have derived largely from his insistence on making informed decisions and setting policy on the basis of
empirical evidence. He points out that the administrator who is similarly oriented must overcome "the fact that, historically, the two most influential professions in crime control and corrections have been those of the lawyers and the clergy. Both are respected and learned, but neither can be said to be devoted to the scientific method." (p. 135.) It is no coincidence that McGee was instrumental in the design and establishment of California's criminal justice statistics bureau.

The book abounds in aphorisms and good one-liners. Two examples: "Be honest, stay honest, and look honest." (p. 39.) "As the district attorney of San Francisco once said when asked why he did not publish his statistics on case dispositions, 'why should I let the press shoot me with my own pistol?'" (p. 136.)

Prisons and Politics is not without minor shortcomings. McGee tends to ignore a preponderance of evidence produced by researchers at Rand, INSLAW, the University of Pennsylvania, Carnegie-Mellon University, and elsewhere that there are at least modest crime control effects associated with the incapacitation of the most crime prone offenders (e.g., at page 81 he reports: "there is no solid evidence that it makes any difference in the crime rate whether burglars are kept fifteen or thirty months."). He mentions a predicament for our nation's jails that resembles our prison predicament, but he says little about the extent to which his prescriptions for prisons apply to problems of jail management. In addition, he devotes only a single sentence to the problem of the inmate's family. (p. 66.) These deficiencies, however, are of no consequence when placed against the book's importance as medicine for dealing with the problems of our nation's beleaguered state prison systems.

In the end, McGee remains optimistic about prison administration:

In spite of the confusion and lack of direction that seems to prevail among correctional workers and leaders in the final decades of this century, there are reasons to feel renewed hope for corrections as a profession. Certainly for those who thrive on challenge, this is where one can find it. (p. 155.)

McGee's Prisons and Politics is an important contribution to the corrections literature. Its primary value lies in the lessons it tells to prison administrators for the 1980s and beyond. If experience is truly the best teacher, prison officials will learn eventually from their own successes and failures. In the meantime, they can benefit from Richard McGee's deep well of experience.

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The death penalty has long been the sovereign state’s ultimate power over the citizen. The solemn procession from the condemned’s cell to the place of execution is the last act of a play written to legitimate the legal order. Beginning with the prosecution’s opening statement to the jury and reaching its zenith at the moment of execution, this drama evokes the symbols of justice and obedience to the sovereign.

Some 600 people await execution. They live in America’s “death rows,” prison cell blocks housing the condemned. From death row it is usually a short walk to the gas chamber or electric chair, the most commonly used methods of execution. That final walk, however, may come several years after sentencing, pending the outcome of lengthy appeals. Meanwhile the condemned must wait in a small, scantily furnished cell, uncertain of how long his life will remain in the balance.

Doug Magee is a journalist who has interviewed many inmates who reside in death row. In *Slow Coming Dark* he presents interviews with twelve of the condemned. It is not clear why these twelve were selected and Magee does not contend that they are statistically representative of all those sentenced to die.

The interviews are brisk and stark. If the contemplation of death is necessary to appreciate life, these interviews provide the living with little inspiration. While the condemned have been sobered by their stay on death row, they express more anxiety about their uncertain futures than reflection on their pasts. Some admit their guilt; others do not. While they regret the pain brought to the murdered and their kin, they see themselves more as pawns than as wrongdoers. These people are not members of organized crime. Nor are they “independent” professional criminals. In the world of crime the twelve are small fry, with sporadic, minor criminal careers. If they are different from the law abiding, it is because they are losers, with pasts cluttered by poverty, broken homes, or other personal losses. Upon conviction of murder, they dealt themselves the final joker.

As losers the inmates interviewed in *Slow Coming Dark* possess a common bond with the population of America’s death rows. The arbitrariness of chance afflicts all social classes, but some more than others. Social tables of chance do not exist apart from social class; the boundaries of our lives are significantly marked by the social class we were born into, and the closer one is to the centrifuge of wealth and power the more likely that the roulette will turn in his favor. Most of the 600-odd
condemned are poor. Many are members of ethnic and racial minority groups. The poor and the black possess no monopoly on murderous intent, but their frustrations and anxieties cannot be readily shed without injury to themselves and to a society that speaks of inalienable freedom while forgetting that the capacity to achieve and acquire necessitates resources beyond the reach of the lower class.

The prominence of the loser on death row is not new. Historically, unpopular political, ethnic, and racial groups have inequitably suffered the death penalty. For example, fifty-four percent of those executed between 1930 and 1961 were blacks, whose race comprised but eleven percent of the population. Bias has operated at all segments of American society, and it is not surprising that it should afflict the criminal justice system. The caprice of capital punishment was recognized in Furman v. Georgia, in which the United States Supreme Court struck down sentencing practices giving either the judge or jury virtually uncontrolled discretion in determining whether capital offenders should live or die. But when the Court later ruled that the presence of sentencing standards could remove its objections to capital punishment, the Justices failed to grasp that procedural protections need not lead to substantive justice. As Yale law professor Charles Black, Jr., has observed, sentencing standards are deficient on three levels. First, they work as pseudo-standards, having little ability to resolve issues of blameworthiness that are more subject to metaphysical examination than delineated criteria. Ask Doug McCray, one of the subjects of Slow Coming Dark. A young black on Florida's death row, he had the misfortune of being sentenced by a judge who set his penalty at death to "set an example," even though McCray's jury had recommended life in prison. Second, sentencing standards do not address the unbounded prosecutorial discretion in charging and plea bargaining. Third, sentencing standards ignore the life and death impact of an attorney's skills, especially when many defendants are represented by inexperienced and overworked public defenders.

The persistent question asked by the condemned of Slow Coming

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1 D. Magee, Slow Coming Dark 3 (1980).
4 E. Sutherland & D. Cressy, Criminology 307 (9th ed. 1974).
8 C. Black, supra note 5, at 14-22.
9 D. Magee, supra note 1, at 27.
Dark is what purpose their executions will achieve. Phil Brasfield is on the Texas death row: "I can't figure out how capital punishment changes anything or makes anything better... If a man steals something you don't go out and steal something of his to show that stealing is wrong. It just doesn't make any sense." Although capital punishment may find its touchstone in the vengeful heart, state executions are best understood as one of the mechanisms of power. As French social historian Michel Foucault has noted, these mechanisms are not so much repressive instruments as productive, definitional strategies that induce desires, shape discourse, and administer our self-concept. These are the strategies of public health, national defense, social welfare, crime control, and a host of other social institutions that interweave the public and private life. The condemned are immersed by the definitional quality of power: their psychology is defined by criminologists; their legal status defined by the courts; their public lives defined by the media; their daily existence defined by the prison. Amidst all this, the drama of trial, sentencing, and appeal sanctifies the mechanism immersing them, from which death is the last escape.

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George Vold's *Theoretical Criminology*, published in 1958, is one of the most highly regarded texts in the field and was sufficiently successful to have gone through eight printings. As testimony to the quality of the original work it is still a valued reference, even though Vold never revised the text. Though Vold died in 1967, the original publishers decided to commission a revised edition to be compiled by another scholar, Thomas Bernard, and to market the revised work under the same title as the original with the name of Vold prominently displayed and, in smaller print, the notation "Second Edition prepared by Thomas J. Bernard." Do the publishers violate any ethical standard by publication under these circumstances of this "second edition"?

The most successful example of this publishing strategy, where the

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10 *Id.* at 72.
successful work of a deceased author is kept current (and therefore mar-
ketable) is Criminology, which was originally written by Edwin Suther-
land under the title Principles of Criminology in 1924. Sutherland was
responsible for the first four editions of the text, published before his
death in 1950. Then Donald Cressey appended his name to Suther-
land’s and published another six editions, the latest appearing in 1978,
under “joint authorship.” The commercial success of “Sutherland and
Cressey” is sufficient evidence that sustaining the usefulness of a text in
this way is ethically tolerable to many criminology instructors.

In his preface to the second edition of Theoretical Criminology Edward
Sagarin argues implicitly that, whereas a literary or artistic classic
should remain untouched, other classic works which have primarily a
didactic function can justifiably be modified. From this point of view
the work is treated as a tool, always capable of being improved, rather
than a finished work of art. Perhaps Sagarin is right; a tool, after all,
need not be a work of art as well. Every text will soon become outdated
and economy of effort argues for revising the best ones rather than start-
ing anew every few years.

Let me suggest a way out of this quandry. Scholars and the pub-
lishing industry could agree on a standard form of reference to works
issued in revised form when the revisions are done by a second author—
something like including the term “revised” in the title and attributing
authorship to both contributors (e.g., Theoretical Criminology Revised
by Vold and Bernard). If such a standard form becomes accepted, confu-
sion about authorship will be reduced and students who have the inter-
est will be signaled to go back to the original work to obtain the
statement by the original author. I doubt whether this strategy will
stimulate a dramatic rise in books published this way. Few texts attain
such enduring prominence as to make sustaining them attractive to pub-
lishers. However, maybe legitimizing the process of posthumous revi-
sion might promote the continued refinement of the very best, or at least
most popular, texts. For authors who do not want their work tampered
with after they are not around to object, it would be a small matter to
include a prohibition in their publishing contract.

Now for the book itself. Not only is the essential emphasis of the
original Vold retained, but for every topic Vold covered, nearly all the
original wording is retained as well. Bernard has made three types of
changes to the original, all of which are done skillfully. First, he has
documented Vold’s statements with new evidence. An interesting note
on advances in the field is that none of Vold’s major conclusions re-
quired substantial modification in the light of research conducted in the
twenty-one years between the two editions. The reader who has used
Vold all these years likely will be pleased with the thoroughness of the updated documentation.

Bernard's second contribution was to include important theories and writings which Vold had failed to include, most notably Thorsten Sellin's theory of culture conflict and crime and Robert Merton's work on anomie. Both works had appeared twenty years before the first edition of Vold and had attracted widespread attention. For that matter Durkheim is not even mentioned in Vold. Bernard corrects the omission with a whole chapter on anomie, including its influence on federal anti-crime policy in the 1960s. Only the ethnographic aspect of Chicago School criminology received much attention in Vold. The other important aspect, human ecology, mentioned briefly in the earlier work, gets its own well-deserved chapter in Bernard.

The third important modification which appears in the new edition is the addition of important new evidence and, in a few cases, whole sub-specialties within and focusing on criminology. The controversy of the relationship between delinquency, race and intelligence is an important development treated in a new section. Biological criminology has been greatly expanded. Important new twin studies are added as well as entirely new sections on learning disabilities, chromosomal studies and autonomic nervous system functioning.

There are some shortcomings in the new edition. A new two-page section on the prediction of dangerousness is, curiously, all the attention paid specifically to violent crime. Though one could excuse this scant treatment on the grounds that Vold excluded the topic originally, still the failure to consider theory and evidence on this phenomenon which is so central to public concern and social control efforts is a serious flaw in the comprehensiveness of the work. Instead, Bernard followed Vold's lead in devoting separate chapters to victimless crime (Vold referred to them as "personality-problem types of crime") and white-collar crime.

Symbolic interactionism, applied to criminology virtually entirely after 1960, is not mentioned in Vold. Bernard's new chapter on the topic is somewhat unsatisfying in that it does not follow the successful pattern set in other chapters of presenting in detail the body of evidence testing the theory. Bernard concludes without presenting sufficient evidence that, "it seems probable that labeling does not create more crime than it eliminates" (citing Tittle). (p. 266.)

Bernard wisely reprinted without change Vold's Chapter 11, "Group Conflict Theory as Explanation of Crime," the seventeen page section in which Vold, for the first time in a text, analyzed crime as a product of social conflict. Bernard then added a separate chapter on contemporary conflict theory, which satisfactorily covers the basic prem-
ises but becomes unnecessarily involved in the distinctions between "conflict theory" (Bernard means pluralist conflict theory) and Marxist theory. Unfortunately discussion of this issue occupies space that might better have been devoted to tests and applications, and discussion of the difficulty of testing and applying, conflict theories. The prominence given Richard Quinney's work and the brief highly critical treatment of the British Marxists makes this chapter unlikely to satisfy contemporary conflict theorists.

A final note on style: In deciding to retain Vold's style and, largely, his words, Bernard kept the good and the bad. The overall style is interesting and clear, however, readers who are at all sensitive to the issue will see both editions as highly sexist in both style and content. The male form of the personal pronoun is used exclusively and in several instances we are treated to distinctions made by "separating the men from the boys." More seriously, no mention is made of women as either offenders (except for one paragraph on the incidence of prostitution) or victims. In both editions we read of Lombroso's persistent positivism and objectivity. His untested but firmly asserted assumptions about the inherent moral inferiority of women are not mentioned. Perhaps we can understand this sexism in Void; Bernard should have known better. He should have included at least a section on the prevalence and differences between crimes of men and women as well as a review of contemporary explanations of the criminality of women. Vold, the conflict theorist, surely would have understood the implications for criminology of women as a minority group.

The strength of this book, as in the original, is the excellent discussion of criminological theories, their intellectual origins and related research. The last chapters on victimless crime, criminal organization, white-collar crime, theory as the basis for research, and corrections, are weak by comparison to the rest of the book. Their weakness is their brevity and the absence of a systematic effort to integrate theory with description.

This text is well suited to use in upper level undergraduate courses (if the students have sufficiently well developed reading skills) and graduate courses on criminological theory. Thanks mainly to the skill of George Vold, Theoretical Criminology contains the best review of criminological theory (excluding conflict theory) available. Thomas Bernard has successfully brought this classic text up-to-date.

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The subject of this book is an analysis of the ways in which the "psychosocial perspective," engendered by the social sciences, has influenced the administration of justice. Courts of law have increasingly come to be viewed as "social" institutions, and the claims that the social sciences are genuine sciences have also been largely accepted. As a result, the courts have increasingly adopted the psychosocial perspective in their deliberations and rulings.

The author argues that both of these tendencies are unsound. Not only is it "perilous" to view the courts as social institutions (and thus as responsive to changing ideological currents), but the notion that the social sciences are in fact sciences is "utterly unwarranted." In articulating this thesis, the author selects for discussion a limited number of contemporary legal issues, issues which he asserts have been rendered incoherent by the adoption of the psychosocial perspective. These issues include "the 'insanity' defense, challenges to testamentary capacity, the protections afforded voluntarily and involuntarily committed patients, the position of the courts on psychological tests and on the legal standing of the defenseless" (p. viii)—i.e., fetuses, persons judged to be insane, and incurables.

The book is undoubtedly a tour de force and is sure to stimulate considerable discussion. Every issue is approached with erudition, precision and wit. The author has mounted a devastating and highly plausible attack on the subtle erosion of timeless legal-moral principles by the testimony of psychiatrists and social scientists. In the concluding chapter, a number of excellent suggestions are made as to the way in which courts should treat psychosocial testimony in the future.

Of all the topics discussed by Robinson, that of insanity and criminal responsibility is probably of greatest interest to the criminologist. His general approach in each chapter is to begin by reviewing the broad historical and philosophical background of the issue at hand, and then progressively to narrow his focus to a review of specific legal cases and arguments. In Chapter 1, for instance, he argues that Man alone among living creatures can be considered a "moral" being. This means in part that human actions are governed by intentions rather than causes; and Man, unlike other species, can conceive of what is universally good and desirable, and believe that such a state of affairs ought to exist. Turning to the role of social scientists in the courtroom, Robinson argues that the testimony provided by social scientists is not scientific, since genuine sciences frame their explanations in terms of universal laws, whereas the
social sciences do not, in fact, have any universal laws. The issue of causality is, moreover, separate from the question of the offender’s guilt or innocence, since the latter is concerned only with his or her intentions and reasons.

Robinson then proceeds to analyze the issue of criminal responsibility and crimes of violence. He reviews the intellectual history of the insanity defense and notes that over the past two hundred years there has been a continuous erosion, rejection and revision of the ancient standard of mens rea. Moral guilt has been transformed into a mental disease—insanity. Initially, the concept of insanity was used to refer to individuals with the intellectual level of an idiot. As such, it had few practical applications to criminals. However, as the criteria were modified and extended to include “irresistible impulse,” “morbid delusion,” and “temporary insanity,” virtually anyone could be exonerated of a violent crime. Disease, in its true meaning, is something palpable and physiological, and of such severity as to place the individual’s well-being and health in jeopardy. Yet, all too often in contemporary courts, the act of the criminal is not shown to be a consequence of disease, but the disease is established by virtue of the act. Furthermore, “expert” testimony on the part of social scientists is not only frequently trite (e.g., “unemployment is frustrating”) but also irrelevant to the issue of whether the defendant is suffering from a genuine disease, and one that actually impinges on his conduct to such an extent as to cause him to commit a crime. However, there is at present no genuine science of so-called mental disease, only a “practical knowledge of tests of doubtful validity” (p. 63), and a clinical knowledge of some human eccentricities. Such “evidence” of mental disease as is presented consists of opinions rather than pertinent facts, the only exception being epidemiologic findings. Epidemiological findings, however, have no bearing on whether the criminal’s mind is, in fact, diseased in any legally or morally significant respect. The net effect of all this, Robinson concludes, is that justice has been put at the mercy of theory, while in the courtroom an “anarchy of speculation” has become the rule. Hence, this part of justice “cannot survive the social sciences” (p. 63).

For this reviewer, Robinson correctly identifies some of the abuses of sociological findings in the courtroom. He also argues convincingly that justice is being eroded by the intrusion of the psychosocial perspective in trials involving the insanity defense. On the other hand, this erosion of justice cannot be blamed entirely on the inadequacies of the social sciences. It could also be due to the ancient legal concept of criminal responsibility; in particular, to the distinction between voluntary and involuntary conduct. Voluntary acts are those for which the agent can be held responsible; involuntary acts are those for which the agent
cannot be held responsible. Given that individuals who are considered legally responsible for their actions are found guilty and punished, whilst others, who may have committed the very same acts, but supposedly during a period of insanity, are found “not guilty by reason of insanity” and possibly acquitted, it is only natural that defendants should try to avoid a guilty verdict by claiming insanity. Thus it is not surprising that efforts have been made, over the years, to extend the grounds for insanity.

Instead of assuming, however, that human actions are mostly “willed”—and here we are arguing against Robinson—the uneasy distinction between voluntary and involuntary conduct could be bypassed altogether by assuming determinism. Determinism, however, does not imply fatalism or inevitability; and, just as important, to “explain” behavior in terms of risk (or causal) factors is not necessarily to explain it away or excuse it. We would therefore agree with Robinson when he states that justice

is also not served by . . . exoneration simply on the finding of a predisposing ‘cause.’ Such exoneration not only teaches bad lessons and violates basic covenants, but it does little for its intended beneficiary. If he is a fraud, it repays his fraud. If he is not, it reinforces what is already a diminished capacity for self-control, . . . . (p. 209).

According to the point of view suggested by this reviewer, individuals should be held legally responsible for all their actions, irrespective of their mental state. It should also be up to them to learn about “risk factors” (e.g., the criminogenic effects of alcohol) and to intervene in causal processes so as to prevent criminal or other irresponsible acts from occurring.

Where the testimony of social scientists and other “experts” is introduced, it would not be for the assessment of responsibility and guilt, but (as others have suggested), it would assist the judge in imposing an appropriate sentence. Thus, at least so far as the insanity defense is concerned, we would argue (contra Robinson) that justice can survive the social sciences, but only if the legal system radically co-opts the deterministic assumptions of the social sciences. On the other hand, justice might not survive if the courts attempt to restrict or disbar the testimony of social scientists, or continue much longer to pretend that homo sapiens alone among the other millions of plant and animal species stands above and beyond the realm of universal determinism.

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BOOK REVIEWS


The widely acknowledged “crisis” of the prison system which made itself felt in the form of ubiquitous prison revolts and a growing “decarceration” consensus throughout the West in the early seventies, has recently produced some remarkable work on the beginnings of the penitentiary institution. Three studies in particular stand out in the field: Michel Foucault’s Discipline and Punish which appeared in English in 1977, Michael Ignatieff’s A Just Measure of Pain (1978) and, most recently, The Prison and the Factory by Dario Melossi and Massimo Pavarini which, though published in Italian in 1977, first appeared in English translation only in 1981.

Of the three studies, the most ambitious and in many ways the most successful is The Prison and the Factory. The book is comprised of two essays of roughly equal length, one devoted to European prisons (by Melossi) and the other to American prisons (by Pavarini). It is therefore the only study of the three to trace the development of the penitentiary throughout the whole Western world. It is also the only one in which the analysis of the prison institution is deeply rooted in the material conditions, and not only the ideas, of the periods discussed (early sixteenth to middle nineteenth century Europe; late seventeenth to middle nineteenth century America). This no doubt is because this study is, finally, the only one of the three studies theoretically informed by Marxism. In fact, The Prison and the Factory benefits immeasurably from the scientific rigor imposed by the precise concerns of the materialist conception of history in this context which, as the authors put it, are to “establish this connection between the rise of the capitalist mode of production and the origins of the modern prison.” (p. 1.)

As it turns out, the authors establish many connections between the history of the prison and that of capitalism. Or perhaps it is a single multifaceted connection. Whatever the proper characterization, the richness of the authors’ methodology and the many possibilities open within it are evident throughout the study. The very pronounced difference in approach (naturally with many similarities) between the two essays themselves readily displays this richness. Melossi’s is more “materialist,” tying the birth of the prison system in Europe and developments within it firmly to the varying needs of developing capital in its struggle with a working class strengthened or weakened by its changing market position. In this way the forced productive labour of the Bridewells and the Rasp-huis, a product of nascent capital under mercantilist protection
in a situation of scarce labour gradually gives way to the terroristic unproductive labour of the English prisons of the nineteenth century, when, economically speaking, capital is able to “stand on its own feet” and control wages by means of a large “reserve army” of unemployed.

Pavarini, on the other hand, tends to stress the formal/ideological relationships in his treatment of America. For example, one of the most striking sections of the book is the concluding section of Pavarini’s essay in which he argues that “[t]he central contradiction of the bourgeois universe is reflected in the microcosm of prison.” (p. 186.) This is the contradiction between the legal equality and autonomy of the worker in the marketplace (“the sphere of circulation”) and his or her complete subordination in the factory (“the sphere of production”)—between “contractual reason” and “disciplinary necessity.” In the prison it appears as the transformation of the legally equal and autonomous (responsible) accused/convicted criminal punished according to codified retributive principles into the really and totally dominated prisoner subject to the arbitrary power authorized by the principle of reform.

One does not want to overstate the differences in approach between the two authors for they are matters of emphasis only. They may even be explained by the real differences in the periods and places studied, though this seems doubtful. Anyway, each author is sensitive to both material and ideological concerns. For example, Melossi has very important things to say about the ideological connections between religious reform and the early forms of penal confinement. Pavarini, on the other hand, explains the initial choice of the unproductive Philadelphia (solitary) system over the productive Auburn (silent) system on the basis of more profitable investment opportunities for capital on the open market.

Furthermore, the authors agree that at the core of the penitentiary system, unifying its history throughout the many changes it undergoes and so unifying the book, is the problem of the creation and reproduction of the proletariat in the social if not the physical sense. According to Melossi “[t]he whole secret of the workhouse and the Rasp-huis lay, right from the very start, in the way they applied bourgeois ideals of life and society to the preparation of people, particularly poor people, proletarians, so that they would accept an order and discipline which would render them docile instruments of exploitation.” (p. 28-29.) It is one of a set of institutions (“from the family to the school, from the hospital to the prison, and so on”) which “organizes . . . that part of capital from which it is possible to extract surplus value.” (p. 46.) In Pavarini’s words, the penitentiary “is like a factory producing proletarians.” (p. 145.) Of course, in Melossi’s more materialist view, this role of the prison is an active one, positively aiding the accumulation process,
while for Pavarini it is a passive role, reflecting changes in the mode of production which lead to new conceptions of the "ideal worker." But the single theme of the making and re-making of the proletariat seems the most promising and powerful yet offered with which to link the prison's past to its present. The differences in approach between the two essays indicate that more theoretical work remains to be done. But they also indicate the line along which it is to be done and they considerably sharpen one's perception of this central issue.

In addition to the two main essays, there is also an Introduction which briefly (and really only suggestively) ties the period under study with the present and the more remote past, and an Appendix which is mostly an extended and very telling materialist critique of Foucault. The book as a whole is prodigiously researched, drawing on the scholarship of several languages and cultural traditions. The translation is, with minor infelicities, successful on the whole in bringing out the admirable literary qualities of the original. The Prison and the Factory is already something of a classic in Europe. Its authors are two of Italy's leading penal theorists and their work deserves great attention on this continent. The translation of this book is therefore a major event for students of social control working in the English language.

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This short work, which comprises three chapters, is an attempt to relate the history of ideas about criminality. Unfortunately, the piece is, for the most part, incomplete, uncritical, unoriginal, and referenced poorly.

In the opening statements of the book, the author asserts that "[c]riminologists . . . are specifically concerned with the possibilities for true justice within the prevailing social order that defines society." (p. 1.) This assertion not only is inconsistent with later statements about the enterprise of criminology,¹ but it places the criminologist in a value-

¹ On pages 13-14, Pelfrey implies that the purpose of criminology is "... to effectively deal [sic] with the problem of crime." On page 51, he asserts that "[c]riminology as a discipline is concerned with the development of a body of knowledge regarding the making of laws, the breaking of laws, and society's reaction to the breaking of laws."
laden position rather than one which strives for ethical neutrality. The first chapter, "The Progression of Criminological Thought," is primarily a compilation of secondary source citation rather than original text; it summarizes briefly the classical and positive schools in criminology and the functionalism and conflict paradigms. Chapter One also contains a section on the "sociology of criminology." This subheading seems to be misleading, for Pelfrey discusses here the cognitive substance of the discipline (i.e., "testing and analyzing of concepts," p. 14) rather than a sociological analysis of criminologists and their ideas.

Chapter Two, entitled "Early Criminological Theories," includes orientations rooted in biology, psychology, and sociology. As in Chapter One, much is borrowed directly from Vold. With this reliance on Vold, the reader sometimes has difficulty ascertaining exactly the point where Vold ends and Pelfrey begins. Essentially, Chapter Two comprises brief and uncritical summaries of various theories, including those of Merton, Cohen, Miller, Sykes and Matsa, Sutherland, Tannenbaum, Blumer, Hirschi, and Reckless.

The first two chapters are incomplete. The first fails to mention the neoclassical school in criminology, however, the M’Naghten Rule and Isaac Ray (both associated with neoclassicism) are mentioned in support of William Healy under the subsection "Psychological Theories" in Chapter Two. Several biologically-based criminological notions are not mentioned in Chapter Two, most notably the ideas of Dugdale; Goddard; Lange; Rosanoff, Handy, and Rosanoff; and Schlapp and Smith. Sellin is not mentioned in the discussions of conflict theorists in Chapters One or Three. Where Sellin is mentioned, under Chapter Two’s "Cultural Deviance Theories," no distinction is made about Sellin’s primary and secondary conflicts among norms.

Chapter Three, "The New Criminology: A Review of the Literature," is, perhaps, the only redeeming feature of the book. This chapter constitutes one half of the total text and is comparatively more extensive and a bit more critical than the two previous chapters. The new criminology is divided into three branches: Conflict (Vold; Turk; Chambliss and Seidman; Chambliss); Critical (Quinney; Taylor, Walton, and Young); and Radical (Platt; the Schwendingers). However, there is no

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3 Note in the following passages about Goring the similarities between Vold’s and Pelfrey’s discussions: "The convicts studied were all recidivists . . . , and there were comparisons with university undergraduates (Oxford and Cambridge), hospital patients, and with the officers and men of units in the British Army, notably the Royal Engineers." Id. at 53. "Goring intended to test this proposition by comparing criminals—all recidivists—to a group of noncriminals—university students of Oxford and Cambridge, hospital patients, and the officers and men of the Royal Engineers of the British Army." W. PELFREY, THE EVOLUTION OF CRIMINOLOGY (1980).
mention of the recent biologically-based and communo-anarchistically-based writings as constituting new criminologies. Chapter Three’s sub-section, “Criticisms of the New Criminology” is unoriginal, but informative. It is unfortunate that the two earlier chapters do not contain similar critical comments.

The referencing throughout the book is rather sloppy, for there are at least thirty-one citations to at least sixteen works which do not appear in the references. The only table in the book (p. 33) is out of place and untitled.

In sum, this book lacks depth and originality. Other books currently in print which relate more extensively and critically the history of criminological ideas should be strongly considered before Pelfrey’s *The Evolution of Criminology*.

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The aims of Justice and Consequences are far more modest than the rather grand title implies. Its concerns are limited to a critique of the rehabilitative ideal and to a series of proposed reforms in the criminal justice system. The principal purpose of the prison should be the humane incarceration of offenders, not rehabilitation. Major reforms are needed in order to overcome the sordid living conditions, dehumanization, and jungle atmosphere so characteristic of America’s prisons. Pervasive idleness, internal lawlessness, omnipresent fear of fellow inmates, ineffective grievance mechanisms, gang warfare, and other disgraces have rendered prison life nasty and brutish indeed. Since much of the book is devoted to these serious problems and their rectification, Conrad’s claim that the “damage wrought by prisons on prisoners is probably overestimated” (p. 68) is not only startling but undermined by his own descriptive evidence.

Genuine rehabilitation of prisoners has been rare, as indicated by recidivism rates. Rehabilitative policy has, however, been successful in fostering the manipulation of inmates. Given that rehabilitation is an unrealizable if not counterproductive ideal, the prison should be concerned primarily with the retribution of offenders through incarceration. The

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prison should not be organized in terms of long-term objectives, Conrad contends, but should perform its custodial duties as competently and lawfully as possible. Insofar as some prisoners do improve in the course of incarceration, all the better. But rehabilitation should remain a "subsidiary" and "incidental" dimension of the correctional enterprise. Vocational training, educational programs, and psychotherapy should be available to all inmates, but not part of a mandatory program. These opportunities will equip those serious about survival in the outside world with the skills for reintegration.

Above all, justice and order must be restored to the prison. Gangs must be eliminated, surveillance and control must be enhanced, the size of a prison population should not exceed 400, inmates should work eight-hour shifts for wages commensurate with those on the outside, the rule of law must be institutionalized, grievances should be independently reviewed, and "interaction" between guards and inmates, including "personal understanding" of the latter, should be nourished. That some of these suggestions may conflict with others—e.g., the rule of law versus increased official control, or intensified surveillance versus personal understanding—is left unconsidered by the author.

Conrad's boldness in rejecting the rehabilitative ideal and embracing incapacitation and retribution is reminiscent of James Q. Wilson's proposals. The difference is that Conrad does not expect incapacitation to decrease the crime rate. Indeed, Conrad dismisses the possibility that any branch of the criminal justice system can significantly reduce crime. Secondly, Conrad demonstrates greater sensitivity than Wilson to the root causes of crime. Crime is largely the result of "contradictions inherent in a capitalist society" (p. 9). Chronic unemployment, poverty, a general lack of opportunity, and other "social injustices" will continue to aggravate the crime problem irrespective of the efforts of the criminal justice apparatus. To remedy these problems, it is necessary that "choice" be maximized. Citizens as well as inmates deserve to be given alternatives to lives of crime and recidivism. Responsibility for the necessary social changes resides with social institutions other than the criminal justice system.

The existence of criminogenic social conditions does not excuse criminal behavior or invalidate the correctional enterprise. While capitalism engenders contradictions that propel people towards criminality, the commission of a criminal act is the result of individual volition, and the malefactor should suffer accordingly. The link here between societal causes and individual action remains obscure. If the "choice" of law-abiding avenues is so limited for the poor and unemployed in a capitalist society, by what logic are they to be held culpable and punished for crimes committed out of apparent necessity? To be sure, this book is not
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greatly concerned with the causes of crime. But to assert that many criminals are victims as much as victimizers, without considering the implications for the administration of "just deserts" to such malefactors, is to sidestep a crucial problem. Moreover, if it is capitalism itself that is to be indicted as criminogenic, it is curious that Conrad ignores the contributions to this issue in the literature of radical and Marxist criminology.

*Justice and Consequences* does not advance novel arguments. It is a collection of previously published articles and, as such, suffers from unnecessary repetition and unevenness. The numerous anecdotes that Conrad indulges in do little to enhance the major points. Despite these drawbacks, Conrad's suggestions for the regeneration of America's prisons are offered with vigor and insight. They deserve to be taken seriously.

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Annotated bibliographical indices on race and crime are readily available from various sources, e.g., the U.S. Department of Justice, National Criminal Justice Reference Service. However, Scott Christianson's *Index to Minorities and Criminal Justice* offers the most comprehensive, current, annotated cross referenced compilation of bibliographic information readily available (in one source) to the serious student of minorities and crime.

Similar to most annotated bibliographies, *Index to Minorities and Criminal Justice* offers the standard "Author Index With Abstracts," complete with full citation. However, unlike most annotated bibliographies, the Christianson *Index* also provides a comprehensive "Table of Content" listing that enables the reader to locate: (1) a list of periodicals indexed; (2) a book publishers index; (3) a comprehensive key to abbreviations; (4) a guide to the use of the subject index; (5) a subject index; (6) guidance on the use of the author index with abstracts; (7) an author index with abstracts; (8) guidance on the use of the index to judicial cases; (9) an index to judicial cases involving American minorities; (10) information about the publisher of the index, i.e., in this case, the
Center on Minorities and Criminal Justice; and (11) an announcement of financial aid for minorities available from the publisher of the index, i.e., Center on Minorities and Criminal Justice, Graduate School of Criminal Justice, State University of New York at Albany.

In brief, Index to Minorities and Criminal Justice is an extremely valuable resource for any one compiling information on the interface of racial and ethnic minorities and crime. While not limited to the indexing of published material on Blacks and crime, it is especially valuable in noting that social dynamic. It does however, provide a rather comprehensive listing of published materials on Hispanics, Indians and crime. If this Index has a shortcoming, that shortcoming lies in the limited citations concerned with Oriental and White ethnic minorities and crime. It is hoped that this Index will be an ongoing reality, and that subsequent editions will address this shortcoming. An index such as this Christianson Index is especially important when one notes the budgetary crisis currently affecting most federal agencies; a reality that is likely to assure the demise of the U.S. Department of Justice, National Criminal Justice Reference Service.

In closing, it should be noted that this Index is easy to read and to use. It is especially useful in compiling suggested and required readings for course syllabi and chapter assignments. This author has also used it to locate that article whose author or title somehow managed to elude his memory.

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The criminal defense attorney’s role is generally concluded upon the acquittal, or sentencing, of the client. For those individuals who are incarcerated, the influence of the bar seldom extends beyond occasional Legal Aid representation in habeas corpus petitions.1 Hickey and

* This review will also appear in the Winter 1982 issue of the CRIM. JUST. Q.
1 Chief Justice Burger has stated, “After society has spent years and often a modest fortune to put just one person behind bars, we become bored. The media loses interest, and the individual is forgotten. Our humanitarian concern evaporates.” Address by Chief Justice
Scharf, on the other hand, are members of that rather curious and insular group which is intimately involved in the theories and practices of prison reform, i.e., they remain interested in the individual after he is incarcerated.

Prison reformers labor under the unfortunate handicap of having to justify their work as they pursue it. The approach to prison reform which is typically embraced by the public is that judges are too lenient, there are too many "country-club" prisons, and the problem of prison overcrowding should be cured (if at all) by increased construction. Almost defiantly, Hickey and Scharf decline to engage in an extended justification of their role. In their preface, they state that "In a democratic society, the very idea of prison is a paradox—or rather a series of paradoxes" (p. ix). Their inquiry begins with a re-examination of the moral validity of the prison itself. Perhaps, their most daring statement is that the justification for prison reform has little to do with lowered recidivism:

Rather, we feel the reason to reform prisons stems from a commitment to social justice. That is, a just society should seek to guarantee social rights for all its people, and inmates simply should not be subjected to the degradations, cruelty, hopelessness, and despair that most experience in American prisons today. The right to democratic participation in prison is more than a psychological or educational technique; it is a fundamental political right. Further, we insist that, far from being soft-headed and romantic, the extension of rights to prisoners is the only way to ensure justice to all citizens, particularly the victims of crime (p. xi).

From this point the authors launch into a brief historical analysis of attempts at prison reform, followed by an elucidation of their "Just Community" method of introducing democratic principles to prison life. To those who are experienced in the fields of moral development, penology, and developmental psychology, this arrangement is no doubt satisfactory. However, to attorneys, and others, who may not have looked beyond the process whereby people are sentenced to prison, and, even more to those who hear something odd and discordant in the phrase "prisoner's rights," it would be well to dwell for a moment on the authors' startling premises.

One may begin to come to grips with the notion that inmates are subjected to "degradation, cruelty, hopelessness and despair" by contemplating the fundamental loss of liberty which results from a prison

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Warren E. Burger, Annual Report to the A.B.A., 8 (Feb. 8, 1981). See also infra note 10. I found it interesting to hear this same concern stated by an inmate at the Federal Correctional Institute at Danbury. This inmate drew an analogy between the legal and medical professions, noting the extended post-operative monitoring carried on by physicians.

sentence. I am considering here, not the dramatic, obvious restrictions which are imposed on a prisoner, but rather the simple, prosaic losses: the ability to move from one room to another, at will; the freedom to pass an evening with friends. The loss of liberty is the loss of one's time; it is the loss of a part of one's life.

Outside that gate is the world of light and freedom, where men live like the rest of mankind. But those living on this side of the fence picture that world as some unattainable fairyland. Here there is a world apart, unlike everything else, with laws of its own, its own dress, its own manners and customs, and here is the house of the living dead—life as nowhere else and a people apart.3

This notion cannot be lightly abandoned. Even a visitor to a prison cannot fail to sense the poignance of this loss when the electrically operated doors slide shut and lock in place. But like the child who covers his eyes to "experience" blindness, a visitor can never fully grasp what is lost to a prisoner.

It is from this perspective that the reader should consider Hickey and Scharf's inquiry into the serious deprivations which are imposed upon inmates. The basic philosophical premise in this book, somewhat oversimplified, is that all human beings deserve respect; that one sentenced to prison does not cease to be a human being. The basic psychological theory, again simply stated, is that through Hickey and Scharf's proposed "Just Community," prisoners may achieve some measure of moral development. This development, they posit, results from prisoners affecting their own lives by participating in certain democratic processes.4

The authors examine some early attempts at prison reform and note some of the factors which led to their ultimate failure. Among the microcosmic points of stress caused by prison reform was the loss of some control which was experienced by prison administrators. In addition, prison reform usually resulted in some loss of power to correctional officers. Naturally, neither group was well-disposed to accept such restructuring. A large and equally serious obstacle to reform was the lack of political support for reform. Prisoners never constituted a constituency, and the public invariably saw attempts at prison reform as a "coddling" of criminals. None of these obstacles has been completely

3 F. DOSTOYEVSKY, THE HOUSE OF THE DEAD 6 (1919). The United States Supreme Court, as well, has recognized the depth of the loss which accompanies incarceration, calling it an "infamous punishment." Flemming v. Nestor, 363 U.S. 603, 617 (1960).

4 Chief Justice Burger evinced similar concerns when he said that prison structures "should be aimed at developing respect for self, respect for others, accountability for conduct, and appreciation of the value of work, of thrift, and of family." Address by Chief Justice Warren E. Burger, supra note 1, at 8.
removed to date, but a new perspective, which may be useful in overcoming them, will be discussed in the subsequent text.

Hickey and Scharf experimented with what they called the "Just Community" in an effort to reform "the basic structure and conception of prison" (p. 63). Through this device they hoped to bring prisoners to the stage of making moral decisions for themselves by causing them to assume responsibility for their actions; by making prisoners aware of the notion of social interdependence. The vehicle for this effort, the "Just Community," consisted of exercises in democratic processes.

The Just Community experiment began at the Niantic Correctional Center for Women. The authors first held workshops in moral development theory which were attended by interested staff of the prison. This staff, in a "model cottage," then began to operate semi-autonomously. This arrangement permitted the staff to engage in negotiations with the prisoners who were involved in the project. With this device, the authors demonstrated respect for the need of the staff to remain involved in whatever changes were to take place. Thus, they avoided the historical error of diminishing the power of the staff as a consequence of implementing reform.

Volunteer inmates appeared at the first meeting, where the authors established themselves as independent mediators. Suggestions were submitted by both sides which were then negotiated by the two groups into proposals. These proposals were then submitted to the prison superintendent. Group meetings and discussions, regarding daily interaction at the cottage, continued along these lines. The goal behind these procedures was "that both staff and inmates would increasingly judge their actions in relation to the moral consensus of the cottage community" (p. 18).

It must already be apparent that the Just Community was a delicate structure, highly dependent on the good-faith efforts of all concerned. Evidence of this delicacy can be seen in problems which arose when the authors later attempted to adapt the experiment to a halfway house and, later, to a men's correctional setting. The fact that the program could not be readily applied to varied correctional institutions may be an indice of imperfection in its structure.\(^5\) In this context, I note

\(^5\) On the other hand, the variables inherent in what the authors are trying to accomplish may be incalculable, thus rendering this criticism short-sighted and pedantic. Still, if the Just Community can only succeed at a few types of correctional institutions, and only with the active participation of these authors, it may be reduced to little more than a sociological oddity. Clearly, much more experimentation is warranted before any such conclusions could be drawn.
the statement by the authors that “the resolution of social conflict in community meetings made uncommon demands on staff members, requiring at times the skill of counselors and sociologists as well as ethical philosophers” (p. 116). One may question how many correctional officers are capable of adequately filling such roles. Indeed, how many professional counselors, sociologists, and ethical philosophers could function effectively, over an extended period of time, in a prison context? This strikes me as a question which must be addressed continually if the Just Community is to be workable. Still, the problems of the authors’ model must not be permitted to overshadow the larger purpose of the Just Community: to encourage a “sense of common ownership of the group” (p. 110) (emphasis in original). This purpose must be seen as sufficiently important to justify the extended effort necessary to implement programs like the Just Community.

The importance of the work is revealed, in part, by the chapter dealing with the results of the experiment. The authors found that there was development in the levels of moral reasoning among those who had belonged to the Just Community. Although rehabilitation is not the cornerstone of the Community, there was, as well, an improved recidivism rate among its members, especially among those at the higher levels of moral development.

The authors do not contend that their model Community should become a fixture in prison life. Indeed, they indicate that the old problems of administrative and staff opposition to reform continue to hamper programs like the Just Community. Public apathy, or outright opposition, are also sources of difficulty in accomplishing meaningful reform. Therefore, the authors call for serious reorganization of the prison structure before democracy can be truly extended to the prison.

The authors’ position rests on their commitment to the ideal, expressed by John Rawls, that “rights granted other citizens at large belong to the inmate unless society can show them to be incompatible with the welfare of the victim and the common welfare so that any reasonable inmate might agree to their temporary suspension” (p. 169) (emphasis in original). Thus, “rehabilitative consideration must necessarily be subordinated to a more important consideration: the moral integrity of the prison per se” (p. 165). There must be an environment which is perceived by all as “just and fair.”

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6 This notion, as expressed by the authors and by Rawls, is hardly novel or revolutionary. Some two hundred years ago, Cesare Beccaria, in his essay *Dei delitti e delle pene*, proposed that “in order that every punishment may not be an act of violence committed by one man or by many against a single individual, it ought to be above all things public, speedy, necessary, the
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It is my hope that the last point made has been made clearly enough: the goal of these authors is not rehabilitation, but rather a wholesale restructuring of the prison system so as to give to society a dignity which it professes to embrace but which, in fact, it has never known. An interesting question to be explored is whether this goal can be achieved pursuant to existing legal theory. The latter inquiry might be best pursued after a critical examination of the role which prisons are supposed to play in society.

Little attention need be given to the goal of "restraint." It is apparent that individuals can be kept apart from society by any variety of walls and fences. The need to restrain some individuals from uninhibited contact with society is not a realistic obstacle to prison reform.

The goal of "deterrence" is more problematic. Few would claim that the threat of prison presently operates as a functional deterrent to those who would commit criminal acts. The common argument is that if prison sentences were longer, and prison life harsher, the goal of deterrence might be achieved. My response to this argument is, that of those who call for longer and harsher prison terms, few can claim to have any meaningful knowledge of the state of modern prison life. It seems to me that the simple philosophy which supports the belief in the deterrent value of incarceration is that prisons are such undesirable places that no reasonable person would take actions which would likely lead to his imprisonment. By "reasonable," I mean those people who are conscious of the consequences of their actions, both as to themselves and as to those whom they affect. This theory is logically quite sound; very few "reasonable" people commit criminal acts. Those who break the law, however, are not these "reasonable people." They do not engage in an extended intellectual balancing process before committing a crime. I

least possible in the given circumstances, proportioned to its crime, dictated by the laws." C. PHILLIPSON, THREE CRIMINAL LAW REFORMERS 82 (1923) (emphasis added).

Rawls refined this notion, although not precisely in a criminal justice context, stating:

A practice will strike the parties as fair if none feels that, by participating in it, he, or any of the others, is taken advantage of, or forced to give in to claims which he does not regard as legitimate. This implies that each has a conception of legitimate claims which he thinks it reasonable that others as well as himself should acknowledge . . . . A practice is just . . . when it satisfies the principles which those who participate in it could propose to one another for mutual acceptance under the aforementioned circumstances.

Rawls, Justice as Fairness, 54 J. of Phil. 653, 657 (1957).

The word "reasonable" is being used here to mean, also, those people who have attained a comparatively elevated level of moral development. See Kohlberg, Introduction to Moral Education, in Readings in Moral Education (P. Sharf ed. 1978). See generally S. HAMPSHIRE, SPINOZA (1951). A Spinozist may argue that "we adjust our moral attitudes haphazardly, regarding people as free agents whenever we happen to be ignorant of the causes of their actions." Id. at 158.
submit that most criminals are not deterred by the threat of prison be-
cause of their simple faith that they will not be arrested, or if arrested
that they will not be incarcerated.

The goal of “rehabilitation” is not truly at issue here. The authors
have not made their proposals from the perspective of those seeking a
reduced recidivism rate, although there is evidence that their Just Com-

munity did result in some success in this area. Consequently, it is not
truly appropriate to inquire into the rehabilitative effect of extending
democratic principles to prison life.

The darkest goal of a prison structure, “retribution,” is the most
difficult to bring into focus. Hickey and Scharf claim that prisons are
presently arranged so as to manifest daily society’s condemnation; to
recast the lawbreaker’s identity into that of a lower being. Society’s
“right to punish” has been long debated, but seldom in the light which
may be appropriate: retribution satisfies a psychological need.
Sigmund Freud stated that it is clear that

the violation of certain taboo prohibitions constitutes a social danger
which must be punished or atoned for by all the members of the commu-
nity if they are not all to suffer injury. . . . If we replace the unconscious
desires by conscious impulses we shall see that the danger is a real one. It
lies in the risk of imitation, which would quickly lead to the dissolution of

8 The ongoing difficulty of effecting rehabilitation in a prison setting was well-illustrated
by Dostoyevsky:

[C]rime cannot be interpreted from preconceived conventional points of view, and the
philosophy of it is a little more difficult than is supposed. Of course, prisons and penal
servitude do not reform the criminal; they only punish him and protect society from
further attacks on its security . . . . [I] am firmly convinced that the belauded system of
solitary confinement attains only false, deceptive, external results . . . . Of course, the crim-
inal who revolts against society hates it, and almost always considers himself in the right
and society in the wrong. Moreover, he has already endured punishment at its hands,
and for that reason almost considers himself purged and quits with society.
F. DOSTOYEVSKY, supra note 3, at 13-14 (emphasis added). The emphasized portion of the
foregoing proposition may be illustrated by an ongoing situation at a Connecticut State
prison. When asked why the chapels at the prison had such extensive seating, the correctional
officer indicated that attendance at services was very high. When pressed on this point, he
acknowledged that many of the prisoners attend, in succession, all of the religious services
held at the prison, with some prisoners attending three or more religious services in a single
day. The reason for this, he acknowledged, was to gain “time out of the cell.” Indeed, it
became apparent that many of the rehabilitative programs were attended largely, if not
solely, because attendance constituted “time out.” One is thus confronted with the bizarre
spectacle of a series of dedicated professionals, conducting well-organized rehabilitative pro-
grams, for a body of prisoners who do no more than go through the physical motions of
participation.

9 See, e.g., Berns, Retribution, Morality and Capital Punishment, in THE PENALTY OF DEATH
42 (1980) (“Do we really know more about crime and punishment than did the ancients?”);
Black, Caprice and Racism in the Death Penalty, in THE PENALTY OF DEATH 23 (1980) (“We
don’t know anything now that Charlemagne or William the Conqueror, mutilators both, did
not know, that tends to establish or disestablish the propriety of blinding as a punishment.
But some widespread revulsion has taken place as to such things.”).
the community. If the violation were not avenged by the other members they would become aware that they wanted to act the same way as the transgressor.\footnote{13} Also implicated in this notion is society's fear of those with power over their lives, and the corresponding need to have available a class of people that is markedly and demonstrably powerless against society. If this need exists, it is easily satisfied by prisons. The more punitive the prison, the easier it is to satisfy the need.

Finally, one must confront the argument that the victim is entitled to be compensated for his loss through the imprisonment of the criminal. This premise is facially responsive to one's sense of justice, but a closer examination reveals a series of unanswered questions. Does the victim know what takes place in prison? And is the lot of the victim improved through the degradation of the prisoner? I do not quarrel with the notion that a victim is entitled to some form of compensation. I would, however, argue that the existing prison structure does not accomplish that goal of compensation.

The question which arises is, what cost is society willing to incur in order to satisfy a psychological need? The monetary expense, alone, is becoming astronomical. It has been estimated that the total cost involved in the construction of a single cell is approximately seventy thousand dollars.\footnote{11} Hickey and Scharf note that varying prison structures and locations make it impossible to isolate a single figure which would represent the yearly maintenance cost for a single prisoner, but a safe estimate is that this expense is also several thousand dollars (p. 174). Finally, they make reference to the enormous losses in property tax dollars, due to the maintenance of thousands of tax-free acres.

The retention of prisons which do not rehabilitate or deter, but which serve only to debase human beings and thus, society as a whole, is, in the words of the authors "an expensive indulgence indeed."\footnote{12} It is the latter cost of prisons which is the highest. I have observed an inmate who was being punished by being placed in "disciplinary segregation" in a federal prison. The punishment consisted of a thirty-day incarceration in a cell approximately six feet wide and ten feet long. He re-

\footnote{10} 13 The Complete Psychological Works of Sigmund Freud 33 (J. Strachy ed. 1955). One may add to this argument the points made by Mr. Justice Brennan, concurring in Rhodes v. Chapman, 101 S. Ct. at 2404. "Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons . . . . Prison inmates are 'voteless, politically unpopular, and socially threatening.'"


\footnote{12} Similar sentiments were expressed by Mr. Chief Justice Burger who has said "We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short term benefits . . . ." Address by Chief Justice Warren E. Burger, note 1 supra, at 7.
mained in the cell for twenty-three and one-half hours out of every twenty-four. He was being punished for having been in possession of a small amount of marijuana. Hickey and Scharf contend that prisoners, as human beings, have some right to be heard regarding the conditions of their confinement. As was demonstrated by their Just Community structure, they are not advocating a wholesale surrender of the prisons to the prisoners. They suggest, rather, that through the use of democratic processes prisoners should have a meaningful voice in the administrative decisions which affect their lives.

III

An area of inquiry not examined by Hickey and Scharf, and possibly not appropriate to the format they selected, is the means by which their proposals might be implemented. Even a statutorily-mandated guarantee of prisoners' rights would face serious obstacles. One is reminded of a passage by Kafka where a subordinate, in praising a former commandant's organization of a penal colony, stated "we who were his friends knew even before he died that the organization of the colony was so perfect that his successor, even with a thousand new schemes in his head, would find it impossible to alter anything, at least for many years to come."

Further, even if prison authorities accepted the notion of increased prisoners' rights, could statutory change find public acceptance? Some hope for overcoming this equally significant obstacle may be derived from the events surrounding the Civil Rights Act of 1964. Prior to the Act, the rights of black citizens were restricted for reasons wholly emotional and illogical. The passage of the Act brought about momentous changes in popular attitudes. I believe it is fair to claim that the Civil Rights Act has led to a new national sensitivity, and aversion, to racial prejudice. This experience suggests that society is capable of accepting statutory changes when those changes correct illogical excesses. John Rawls has stated that it is an element of justice to provide the greatest liberty possible under the circumstances. He posits that if a greater liberty is possible, without loss or conflict, then it is irrational to settle on a lesser liberty. Further, as Cesare Beccaria has noted, advancing civilization brings greater sensitivity. It is certainly true that punishments

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13 It may be noted, parenthetically, that the prison involved, located in Connecticut, is a "Level Two" prison. Federal prisons are rated on a scale of one through six, with a level one prison being the most minimal security prison.
14 F. Kafka, In the Penal Colony, in THE PENAL COLONY 193 (1948).
16 Rawls, supra note 6, at 653-54.
17 C. Phillipson, Three Criminal Law Reformers 60-61 (1923). This hopeful state-
which were acceptable two hundred years ago are viewed as unacceptably barbarous today.\textsuperscript{18} Perhaps, then, society may be capable of accepting the statutory correction of a patent irrationality.

IV

Some mention should be made of the theoretical legal bases by which Hickey and Scharf's theories could be implemented. It seems quite safe to say that most courts would soundly reject an assertion that prisoners have a right to be heard regarding the conditions of their confinement. An examination of recent authority, however, suggests that the seed for such an argument has already been planted.

The United States Supreme Court has endorsed some powerful principles regarding the rights of prisoners. In \textit{Hutto v. Finney}\textsuperscript{19} the Court said that the eighth amendment does more than proscribe \textit{physically} barbarous punishment. "It prohibits penalties that are grossly disproportionate to the offense, . . . as well as those that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity and decency.'\textsuperscript{20} In \textit{Bell v. Wolfish},\textsuperscript{21} the Court noted that prisoners' rights are not limited to those available under the eighth amendment; their first and fourteenth amendment rights are not wholly forfeited by reason of their conviction and confinement.

The significance of these assertions is that they reflect a recognition of the fact that a prison sentence need only result in confinement. The sentence is for a period of time; it does not dictate the daily conditions of confinement. Stated another way, society has not taken it upon itself institutionally to strip men and women of basic human dignity. Nonetheless, the methods by which the courts have applied these high principles to the reality of prison conditions do not encourage those who would institute major prison reform.

The courts have routinely deferred to the "expert judgment" of corrections officials for a determination of whether the conditions of prison

\textsuperscript{18} See, e.g., CONN. GEN. STAT. Tit. VII (1808):  
[W]hsoever shall commit adultery with a married woman, and be thereof convicted before the superior court, both of them shall be severely punished, by whipping on the naked body and stigmatized, or burnt on the forehead with the letter A, on a hot iron; and each of them shall wear a halter about their necks, on the outside of their garments, during their abode in this state, so as it may be visible . . . .


\textsuperscript{21} 441 U.S. 520, 545 (1979).
life are "reasonable." This approach has given rise to growing opposition by those justices who see serious dangers in such blind faith. The voice of this opposition was raised the loudest in the recent Supreme court decision of Rhodes v. Chapman. In that case, Justice Brennan, in concurrence and joined by Justices Blackmun and Stevens, noted that "judicial intervention is indispensable if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prison." Justice Brennan's sentiments were echoed by Justice Blackmun in a separate concurring opinion, and also by Justice Marshall, in dissent.

It is well beyond the scope of this book review to construct a legal theory which would support the prisoner's right to participate in decisions regarding his confinement. However, some attention might be given to Justice Marshall's dissent in Bell v. Wolfish where he argued that prison restrictions must satisfy a substantial necessity test, rather than a rational basis test, in order to stand. This argument developed from his recognition that "the withdrawal of rights is itself among the most basic punishment that society can exact, for such a withdrawal qualifies the subject's citizenship and violates his dignity."

V. CONCLUSION

Prisons are the worst possible setting for instilling moral values in people. Obviously, the task would be easier if effected before the individual committed his first crime. Further, early moral education, if it prevented the crime, would avoid the terrible economic and psychological harm which accrues to victims. Society would not have to expend badly needed funds in the investigation, prosecution and incarceration of the offenders. All of this is obvious, however, and fails to confront the reality that prisons and prisoners do exist. Hickey and Scharf have pro-

22 Bell v. Wolfish, 441 U.S. at 540 n.23, 545, 547. See also Rhodes v. Chapman, 101 S. Ct. at 2400, 2401 n.16.
24 101 S. Ct. 2392.
25 Id. at 2402-03 (Brennan, J., concurring) (emphasis in original).
26 Id. at 2410.
27 Id. at 2413.
28 441 U.S. at 563. It is of at least passing interest to note that, in connection with the settlement of a recent prison overcrowding case, Judge Jose Cabranes has ordered the posting of a notice whereby the court will receive prisoner commentary regarding proposals intended to upgrade the conditions of their confinement. Lareau v. Manson, No. 78-145 (D. Conn. Aug. 14, 1981). This proposal is less significant than it first appears, however, since the prisoners are being allowed to note objections as class members, not as prisoners per se.
29 441 U.S. at 589 (Marshall, J., dissenting).
posed methods of dealing with prisons and prisoners, methods which do not do violence to the democratic principles that our society purportedly embraces. It is to be hoped that the theories are correct, and, if correct, that they are utilized. Hickey and Scharf may be pointing the way to a diminution in the rate of crime, but perhaps more importantly, they are proposing a means by which society may give itself a truer sense of dignity.

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